No. _____

Supreme Court, U.S.
FILED
93 1762 MAY 5 1994
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DUANE AND PAMELA LARSON, Petitioners

v.

CHRISTOPHER G. SANFT, ET AL, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Duane and Pamela Larson
Pro Se
22281 Clearbrook
Mission Viejo, CA 92692
Phone: (714) 830-6025

QUESTIONS PRESENTED

I. DID THE MINNESOTA SUPREME COURT HAVE APPELLATE JURISDICTION TO REVIEW AND DECIDE A FACTUAL ISSUE WHICH WAS NOT REACHED BY THE DISTRICT COURT, NOR REVIEWED BY THE APPEALS COURT, WHERE THE APPEALS COURT EXPRESSLY HELD THE DISTRICT COURT DID NOT DECIDE THE ISSUE AND THEREFORE IT HAD NO APPELLATE JURISDICTION TO REVIEW THAT ISSUE?

II. DID THE MINNESOTA SUPREME COURT DENY PETITIONERS THEIR FUNDAMENTAL SUBSTANTIVE FIRST AMENDMENT RIGHT TO PETITION THE COURTS FOR REDRESS WHEN IT GRANTED SUMMARY JUDGMENT ON A FACTUAL ISSUE NOT REACHED BELOW?

III. WAS THE DECISION MADE BY THE MINNESOTA SUPREME COURT THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT BOTH CONTRARY TO U.S. SUPREME COURT LAW GOVERNING SUMMARY JUDGMENT PROCEDURE, AND FACTUALLY IN ERROR WHERE THE RECORD SHOWS SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED FOR PLAINTIFFS, NOT DEFENDANTS?

IV. WERE PETITIONERS DENIED EQUAL

PROTECTION OF LAW IN VIOLATION OF THE 14TH AMENDMENT?

V. IS THE MINNESOTA COURTS' NEW REQUIREMENT FOR AN EXHAUSTION OF ADMINISTRATIVE REMEDIES PRIOR TO FILING A 42 USC 1983 ACTION ACCEPTABLE TO THIS COURT, AND HAVE THE MINNESOTA COURTS MISINTERPRETED THE QUALIFIED IMMUNITY PROTECTION SET OUT IN ANDERSON V. CREIGHTON BY FINDING THE STATE AGENTS' SUBJECTIVE SELF-SERVING BELIEF THAT PETITIONERS HAD ABANDONED THEIR FULLY PAID FOR HOME WHEN DUANE WAS SENT TO PRISON ENTITLED THEM TO QUALIFIED IMMUNITY WHERE MINNESOTA LAW, IN FACT, HOLDS THE BURDEN OF PROOF OF ABANDONMENT IS ON THE AGENTS TO PROVE BY CLEAR AND CONVINCING EVIDENCE?

VI. DID THE MINN. COURTS VIOLATE PETITIONERS' PROCEDURAL DUE PROCESS RIGHTS BY GRANTING SUMMARY JUDGMENT HOLDING THE STATE'S OWN AUCTION BID OF $66,500 IN 1990-1992 WAS THE FAIR MARKET VALUE FOR PROPERTY WHICH HAD A REAL FAIR MARKET VALUE OF $124,000 WHEN IT WAS SEIZED BY THE STATE IN

1987, BUT WHICH THEREAFTER WAS NEGLECTED BY THE STATE AND LEFT TO DETERIORATE IN VIOLATION OF MS 270.71 UNTIL ITS VALUE BECAME THE SCRAPE VALUE OF $61,500?

VII. DID THE MINNESOTA COURTS ABUSE THEIR POWER AND DISCRETION THROUGHOUT THIS CASE EVEN TO THE POINT OF PUNISHING PETITIONERS FOR SEEKING THE RETURN OF THEIR HOME IN ACCORD WITH 125 YEARS OF HOMESTEAD LAW?

PARTIES TO THE PROCEEDING

The parties to this case are: The State of Minnesota; Minn. Department of Revenue employees Christopher Sanft, Jerry McClure, Randy Becker, and Neil Scott in their individual capacities; Mr. and Mrs. Hilligoss and Mr. and Mrs. Van Rossum as present property owners; and County of Le Sueur employees Robert Richter, David Sexe, Terry Overn, and Harry Christian.

TABLE OF CONTENTS

Questions Presented.....i

Parties to the Proceeding.....iii

Table of Contents.....iii

Table of Authorities.....iv

Petition.....1

Opinions Below.....2

Jurisdiction.....3

Statement of the Case.....4

Reasons for Granting the Writ.....15

Conclusion.....62

Appendix

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....16,41

Anderson v. Creighton, 483 U.S. 635 (1986).....ii,17,46,52,53

Beigler v. Chamberlin, 176 N.W. 49 (Minn.1920).....36,43

Blazak v. Ricketts, 971 F2d 1408 (9th Cir.1992).....25

Board of Regents of State College v. Roth, 408 U.S. 564 (1972).....21

Boddie v. Conn., 401 U.S. 371 (1971)..27,54

Casey v. State Farm Mut. Auto. Ins. Co., 464

N.W.2d 736 (Minn.App.1991).....22

Celotex v. Catrett, 477 U.S. 317 (1986).....16,42

Chizmada v. Smiley's Point, 726 F. Supp. 249 (Dist. Minn.1989).....25

Cont. Swed. Corp. v. M/V Nan Fung, 719 F. Supp. 1202 (S.D.N.Y.1989).....59

Denzer v. Pendergast, 126 N.W.2d 440 (Minn.1964).....36

Elwood v. Co. of Rice, 423 N.W.2d 671 (Minn.1988).....48,49

Eustice v. Jewison, 413 N.W.2d 114 (Minn.1987).....30,35,48

Felder v. Casey, 487 U.S. 131 (1988)...17,47

Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981).....25

Greiswold v. Conn., 381 U.S. 479 (1965)...21

Harper v. Paradise, 210 S.E.2d 710 (Ga.1974).....60

Harlow v. Fitzgerald, 457 U.S. 800 (1981).....51,53

Hentges v. P.H. Feely & Sons, 436 N.W.2d 488 (Minn.App.1989).....40,60

Hickman v. Sutherland, 23 N.W.2d 593 (Minn.1946).....34,39,53

In Re Haggerty, 448 N.W.2d 353 (Minn.1989).....35,43

In Re Hoffman, 354 N.W.2d 581 (Minn.App.1984).....35

In Re Johnson, 880 F2d 78 (8th Cir.1989).....36,43

In Re Joy, 5 B.R. 681 (1980).....35

In Re Peterson, 897 F2d 935 (8th Cir.1990).....35

Johnson v. Group Health,994 F2d 543 (8th Cir.1993).....42

Liebermann Music v. Hagen, 404 N.W.2d 290 (Minn.App.1987).....32

Logan v. Zimmerman Brush Co., 455 U.S.422 (1982).....21

Lujan v. Nat. Wildlife, 110 S. Ct. 3177 (1990).....16,41

Marbury v. Madison, 5 U.S. 137 (1803).....16,22,24,25

Michigan v. Long, 463 U.S. 1032 (1983)...18

Millet v. Pearson, 173 N.W.2d 411

(Minn.1919).....35

Moore v. City of E. Clev., 431 U.S. 494 (1977).....21

Muscala v. Wirtjis, 310 N.W.2d 696 (Minn.1981).....35

NY City Transit Auth. v. Beazer, 440 U.S. 568(1979).....44

O'brien v. Skinner, 414 U.S. 524 (1974)...23

Oxborough v. Martin, 170 N.W. 707 (Minn.1919).....32,39,60

Planned Parenthood of SE Penn. v. Casey, 112 S. Ct. 2791 (1992).....64

Sisco v.Paulson, 45 N.W.2d 385 (Minn.1950).....35

State v. Strom, 493 NW2d 554 (Minn.1992)..57

Thayer v. American Financial, 322 N.W.2d 599 (Minn.1982).....24

Thompson v. Barnes, 200 N.W.2d 921 (Minn.1972).....24

Thiel v. Stich, 425 N.W.2d 580 (Minn.1988).....24

Trengen v. Mongeon, 200 N.W.2d 50 (N.Dak.1972).....25

U.S. v. 564.54 Acres of Land, 441 U.S. 506 (1979).....17,57

U.S. Dept. of Agr. v. Moreno, 413 U.S. 528 (1973).....46

Uselman v. Uselman, 464 NW2d 130 (Minn.1990).....58,59

Vickery v. First Bank of LaCrosse, 368 N.W.2d 758 (Minn.App.1985).....34

Yick Wo v. Hopkins, 118 U.S. 351 (1886).....45

U.S. STATUTES

28 USC 1257.....3
28 USC 1651(a).....26
28 USC 2101(c).....3
42 USC 1983...ii,4,13,14,17,18,46,47,57,63

MINN. STATUTES

MS270.01(5).....13
MS270.71.....iii,4,14,54,57
MS273.124.....8,32
MS507.34.....4,60
MS510.01 4,13,14,20,29,32,34
MS510.02.....4,12
MS510.07.....4,13,21,30,35,37,48,50

OTHER AUTHORITIES

U.S. S. Ct. Rule 13.1.....3
U.S. S. Ct. Rule 13.4.....3
U.S. S. Ct. Rule 20.1.....26
U.S. S. Ct. Rule 20.3.....26

U.S. Constitution; 1st amendment.....3,26,27,28

U.S. Constitution; 14th amendment.....throughout

Minnesota Constitution; Art I, sec. 7.....4,20

Minnesota Constitution; Art I, sec.8.....4,13,27

Minnesota Constitution; Art I, sec. 11..4,62

Minnesota Constitution; Art I, sec. 12.....4,13,37

F.R.Civ.P. Rule 56.....42
F.R.Civ.P. Rule 11.....59
Minn.R.Civ.P. Rule 11.....59
Minn.R.Civ.P. Rule 19.01.....59,61
Minn.R.Civ.P. Rule 56.....42

Black's Law Dict. 5th ed.; West Pub. 1979.....25

The Law of Property (Student Ed., 1984)...60

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DUANE AND PAMELA LARSON

PETITIONERS

V.

CHRISTOPHER B. SANFT, ET AL

(i.e. STATE OF MINNESOTA)

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE MINNESOTA SUPREME COURT

Petitioners respectfully pray that a writ of certiorari issue to review the order of the Minnesota Supreme Court entered on 2-22-94 denying petitioners' petition for rehearing, and the order of the Minn. S. Ct. entered in this proceeding on 11-9-93 reversing the Minn. Appeals Court opinion issued on 9-3-93.

OPINIONS BELOW

The Minn. S. Ct order of 2-22-94 denying petitioners' petition for rehearing is unreported and is reproduced in the appendix hereto at p.1. The Minn. S. Ct. order of 11-9-93 reversing the Minn. Appeals Court remand is unreported and is reproduced in the appendix hereto at pp.2-3. The Minn.

Appeals Court unpublished opinion of 9-3-93 is reproduced in the appendix at pp.4-23. The Minn. district court's letter order expressly refusing to reach the homestead issue is reproduced at P.24. The Minn. district court's order of 1-7-93 is unreported and is reproduced in the appendix hereto at pp.25-46.

JURISDICTION

The order of the Minn. S. Ct. denying petitioners' timely filed petition for rehearing was entered on 2-22-94. Title 28 USC 2101(c) and S. Ct. Rule 13.1 and 13.4 permit filing a petition for writ of certiorari in civil cases within 90 days of the denial of a petition for rehearing in the lower state court. This petition is timely filed within that 90 days. This Court's jurisdiction is invoked under 28 USC 1257. The relevant federal statutory and U.S. Constitutional and state provisions are reproduced at app.67-9. These are the 1st and 14th amendments to the U.S.

Constitution; 42 USC 1983; Minn. Const. Art. I, secs. 7,8,11,12; and Minn. Stats. 270.71, 507.34, 510.01, 510.02, 510.07.

STATEMENT OF THE CASE

It is significant for this Court to note at the outset that the Minnesota district court took no evidence nor held any hearing whereat any witnesses testified on any matters whatsoever. All rulings were made solely on petitioners' motion for summary judgment, and respondents' cross motions for summary judgment with only the exhibits attached to these motions for a court record.

On 5-15-80 petitioners bought a house at 1037 Thunderbird Hills, Kasota, Le Sueur County, Minnesota. (Kasota is considered to be a suburb of Mankato). This house was negotiated for, and paid for, by Duane and Pamela Larson, but Duane's parents, Mr. and Mrs. Lawrence Art Larson, were made the nominee holders of the house. A deed was recorded in Le Sueur county in the nominees'

name, with an unrecorded deed issued to petitioners from the nominees on 5-16-80. See app.64-6. See also district court J. Young judgment of 1-7-93, p.3 at app.28 and p.5 at app.32. Shortly thereafter petitioners bought lot 1035 in the name of SPD Corporation, a legal Minn. Corporation.[1] See judgment of 1-7-93, p.3, app.28, and appeals court opinion at p.2, app.6. Petitioners were 100% owners of SPD Corporation. See App. Ct. p.2 at app.6. Petitioners lived in the house on lot 1037 from the summer of 1980 until 1985 when Duane was sent to prison. App. Ct. at p.4, app.9. See also judgment of 1-7-93, p.3 at app.29. Their two children were born while they lived there. See affidavits of 10-26-89. App.52-6. It is undisputed that petitioners both owned and lived on lots 1035 and 1037, even though the property was

---

[1] The initials SPD stood for Shawna, Pamela, and Duane. Shawna was petitioners' only child at the time of SPD's incorporation.

held, and the property taxes paid through, nominees SPD Corp. and L. Art Larson. App. Ct., p.2,4, apps.6,9 and dist. ct. judgment of 1-7-93, p.3, at app.29, and p.5 at app.31-2.[1] On 6-25-85 Duane was sent to federal prison for 15 years. On 8-19-85 Duane conceded in federal court before U.S. Judge Devitt that he owned the property at 1035 and 1037 TB Hills. See app. ct. dissent at app.23.[2] On 8-21-85 Le Sueur County recorded a tax lien for the Minnesota Dept. of Revenue (i.e. MDR or DOR) against Duane and Pamela Larson and L. Art and Theresa Larson and SPD Corp <u>as nominees for the below property</u>. On 9-9-85 the MDR recorded a tax lien naming <u>Duane and Pamela Larson</u> and providing the legal description

---

[1] Petitioners also owned a lake cabin, farm house, rental house, and vacant land through different nominee holders.

[2] It should be noted that the plea agreement showed SPD held lot 1037 and Art Larson held lot 1035. This was a scrivener's error. SPD held lot 1035 and Art Larson held lot 1037. This error was perpetuated in the Minn. App. Ct. dissent.

for the property at 1035 and 1037 TB Hills as the applicable property. In September, 1985 Duane wrote the Minn. Atty. Gen. and asked for a copy of the Minn. homestead laws. In October, 1985 the Atty. Gen. refused this request by letter.

On 4-22-86 the Minn. Tax Court held trial for case #4463 where it was alleged petitioners owed state income taxes for the years 1978-1980. That allegation was founded solely on a federal criminal guilty plea for tax evasion for the tax year 1979.[1] Duane was incarcerated at the time of the Minn. Tax Court trial, but he had previously hired two attorneys to represent him. Neither of these attorneys appeared for trial and the Tax Court defaulted petitioners.

Petitioners maintained insurance on

---

[1] The U.S. Tax Court held trial for the federal civil tax case on 6-20-93 to determine whether any federal taxes were owed for the years 1978-1980 (case #44303-85). That decision is pending at this writing.

their home at 1037 TB Hills while it was vacant,[1] which they bought through Weir Insurance Agency who had in turn underwritten the insurance through the **STATE OF MINNESOTA PROPERTY INSURANCE PLACEMENT FACILITY**. See policy at app.59-61. This policy included liability insurance for lot 1035. On 1-14-87 Duane told his federal Bureau of Prisons "release planning team" that he intended to return to his house at 1037 TB Hills, Rt.1 Kasota, Mn to live with his wife Pamela upon release from prison. On 3-18-87 Duane wrote to the Le Sueur Co. Auditor to inquire about a homestead tax credit (Minn. Stat. 273.124) for the Le Sueur Co. properties owned by petitioners. See dist. ct. order at p.6, app.32. On 4-10-87 agent Sanft of the MDR called James Hulwi, petitioners' family attorney, to ask if petitioners would voluntarily transfer

---

[1] While Duane was in prison at Sandstone, Minn. Pamela temporarily moved out of the house in Oct. 1985 to be closer to Duane.

ownership of their home at 1037 TB Hills to the MDR. App.57-8. Petitioners refused. On 5-13-87 Duane again informed his BOP release planning team that he intended to return to his 1037 TB Hills Rt.1 Kasota, Mn home upon his release.

On June 8, 1987 the MDR recorded a Minn. State Tax Lien dated 6-3-87 against petitioners and on their home at 1037 TB Hills listing Lawrence A. Larson and Thressa Larson as nominees for Duane Larson and Pamela Larson. On 6-9-87 the MDR seized 1037 TB Hills for income tax liabilities for the years 1978-1980. On 8-3-87 the MDR seized 1035 TB Hills.[1] On 8-6-87 the MDR

---

[1] This Court should note that the notice of deficiency of Minn. state income taxes on which the Minn. Tax Court defaulted petitioners, and on which the MDR then in turn seized petitioners' home, was based entirely upon the federal guilty plea for the single tax year 1979. The state admitted at the Mn. tax court trial it had no evidence of income other than the plea agreement. Duane was not criminally charged by the state. In June, 1993 the U.S. Tax Court held trial to determine petitioners' tax liabilities for the years 1978-1980. The U.S. Comm. of Rev.

recorded the Notice of Levy for 1037 TB Hills listing Lawrence A. Larson and Thressa Larson as nominees for Duane and Pamela Larson and naming the nominees as the "Party...possessing property of taxpayer". Also on 8-6-87 the MDR recorded the Certificate of Seized Property for 1037 TB Hills for nonpayment of income taxes by petitioners. This document listed Duane and Pamela Larson as owners of 1037 TB Hills and clearly stated: "This certificate transfers to the purchaser all rights, title and interest of the taxpayer in and to the personal property described above." The property is described as "Lot 37, Block 1 Thunderbird Hills" and the Taxpayer is Duane and Pamela Larson. On 8-18-87 the MDR

---

presented no evidence of income for the years 1978-1980, even though, as a fraud case, it was the CIR's burden of proof. Should the U.S. Tax Court now find petitioners owed no, or only a small amount of tax, this will mean the MDR seized petitioners' homestead and four other properties for back income taxes when in fact petitioners owed no taxes.

recorded an affidavit of service by mail listing Lawrence A. and Thressa Larson as nominees for Duane and Pamela Larson.

On 10-1-87 the MDR recorded the Notice of Seizure and Sale for 1035 TB Hills listing SPD Corp. as nominees for Duane and Pamela Larson. Also on 10-1-87 the MDR recorded the Notice of Levy for 1035 TB Hills listing SPD Corp. as nominees for Duane and Pamela Larson and naming the nominee as the "Party...possessing property of taxpayer. Also on 10-1-87 the MDR recorded the Certificate of Seized Property for 1035 TB Hills. This document listed Duane and Pamela Larson as owners of 1035 TB Hills and stated: "This certificate transfers to the purchaser all rights, title and interest of the taxpayer in and to the personal property described above." The property is described as "Lot 35, Block 1 Thunderbird Hills" and the Taxpayer is Duane and Pamela Larson. Lot 1035 was part of petitioners' homestead per Minn. Stat.

510.02.[1]

In early 1988 the MDR sold the house at 1037 TB Hills to the Hilligoss', who were local area police officers. On 5-10-88 lot 1035 was sold to petitioners' neighbor Barry Braun, for $2,100 who then sold it to the Van Rossums. On 8-29-88 attorney Bruce Miller served Duane at Sandstone FCI with an action to determine adverse claims pending the sale of lot 1035 by Braun to the Van Rossums. On 8-31-88 Duane explained in a letter to Miller that SPD Corp. owned lot 1035 and SPD was owned by petitioners, but the lot had been seized by the state against petitioners' will.

On 10-26-89 Duane and Pamela Larson prepared affidavits for the Mn Tax Court. These were submitted on 12-11-89 when petitioners filed a motion in Minn. Tax Court, case #4463, against the Mn. Comm. of Rev. seeking the return of their homestead

---

[1] The relevant cited Minnesota law is reproduced in the appendix at pp.68-9.

and were again submitted to the district court in this case with the affidavit of 8-11-92. Apps.47-56. The Commissioner's response of 4-19-90 was that petitioners ceased to occupy the property when Duane began serving his prison sentence and therefore petitioners had abandoned their home as evidenced by their failure to file a notice of non-abandonment pursuant to MS 510.07. App.69. The motion was dismissed by the Minn. Tax Court for lack of jurisdiction over real estate by the tax court per MS 270.01(5) on 5-18-90.

On 12-12-91 Duane was released from prison. On 6-12-92 petitioners filed their complaint in Le Sueur County Court, case # C1-92-153 seeking the return of their homestead plus damages, or it's value plus damages, pursuant to Minn. Constitution Art. I secs. 8, 12, and Minn. Stat. 510.01. App.68. They also sought civil rights damages per 42 USC 1983 from the MDR agents individually, and the fair market value,

from the state, for their other seized properties pursuant to Minn. Stat. 270.71.' App.68.

On 8-11-92 petitioners filed a motion seeking summary judgement. On 8-22-92 petitioner Duane Larson started law school in Irvine, California. On 1-7-93 the district court denied petitioners' motion en toto but collectively granted defendants' cross motions for summary judgment. On 1-27-93 the district court expressly refused to decide whether lots 1035 and 1037 TB Hills were petitioners' homestead as defined by Minn. Stat. 510.01. See app.24. Petitioners appealed on the 42 USC 1983 grounds, and also alleged they had not been given a full and fair opportunity to be

---

' Four other non-homestead properties were seized by the MDR in 1987 and were left neglected and unoccupied by the state for 4-5 years in violation of MS 270.71. During that time they deteriorated to such a dilapidated state that when they were finally sold by the state they brought only scrape value. These properties consisted of three houses, and one empty piece of real estate.

heard in the district court on the fair market / MS 270.71 issue. On 9-7-93 the appeals court held it lacked appellate jurisdiction on the homestead return issue because the district court had not decided that issue. App.12. The appeals court remanded on that issue but affirmed the district court on all other issues. On 11-9-93 on petition for review by both the state and petitioners, the Minnesota Supreme Court held: "..we review only that portion...reversing the summary judgment...with regard to the ...homestead property...Our review of the record indicates that there exist no genuine issues of material fact ..Accordingly, we reverse". See order at app.2-3. Petitioners petitioned for rehearing asserting the Min. S. Ct. did not have appellate jurisdiction on the homestead issue, and further its factual finding was contrary to summary judgment procedure law and factually erroneous in any event. The petition was denied on 2-22-94.

REASONS FOR GRANTING THE WRIT

I. Without appellate jurisdiction the Minn.

S. Ct. granted factual summary judgment on an issue not reached by the Minn. Dist. Ct., nor reviewed by the Minn. App. Ct., and in conflict with caselaw as far back as Marbury v. Madison, and in violation of petitioners' 14th fundamental, substantive, individual homestead rights guaranteed through the Minn. Constitution.

II. The Minn. S. Ct. denied petitioners their fundamental, and substantive 1st amendment right to petition the courts for redress by making a factual finding without appellate jurisdiction.

III. The Minn. S. Ct.'s actions are in direct conflict to the rules of summary judgment set forth by this Court in Celotex, Lujan, and Anderson v. Liberty.

IV. Petitioners were denied equal protection by the state of Minn., even by rational basis review, in violation of the 14th amendment.

V. The Minn. Courts have set precedent through this case requiring an exhaustion of

administrative remedies prior to filing a 42 USC 1983 action in direct conflict with this Court's holding in Felder v. Casey; and further have granted qualified immunity in conflict with this Court's holding in Anderson v. Creighton.

VI. The Minn. Courts have erroneously granted summary judgment and qualified immunity without taking any evidence in violation of its own statutes and this Court's law as cited above, but also in conflict with U.S. v 564.54 Acres, on "Fair Market Value", its own caselaw definitions, and in violation of petitioners' procedural due process.

VII. The Minn. Courts have abused their power and discretion in this case for the purpose of legalizing the state's illegal actions.

One must not lose sight of the fact that this case is NOT a case decided solely on state law. Rather, this is a case which has NOT BEEN DECIDED AT ALL. The minn. S.

Ct. lacked appellate jurisdiction to make a factual finding that the district court did not reach. Had a decision been made solely on state law this case would still involve 42 USC 1983 issues, but from the Minn. S. Ct.'s opinion it is not clear how the Minn. S. Ct. believed it had appellate jurisdiction in accord with either the U.S. 14th amendment or the Minn. Const., therefore this case is reviewable. See Michigan v. Long, 463 U.S. 1032 (1983), This case is about result-oriented judicial unfairness and fundamental individual rights deprivations. While this Court has not decided whether procedural Due Process standing alone is guaranteed by the 14th amendment in civil cases, this case involves fundamental, individual rights and therefore substantive Due Process is involved, which is guaranteed by the 14th amendment. At the same time there is one important question of a purely civil procedural due process nature and this case provides an excellent

opportunity for this Court to decide the civil procedural due process guarantees of the 14th amendment. As will be seen, infra, the Minn. Courts have literally disregarded the law in order to reach the result they sought. Petitioners presume the court felt it could do so with impunity due to this Court's having never decided the question of 14th amendment procedural due process guarantees in civil cases. Petitioners respectfully ask this Court to grant certiorari on the substantive due process issues, but also suggest certiorari be granted to decide the unanswered question of whether the 14th amendment protects non-substantive procedural due process.

I

THE MINNESOTA SUPREME COURT DID NOT HAVE APPELLATE JURISDICTION TO REVIEW AND DECIDE A FACTUAL ISSUE WHICH WAS NOT REACHED BY THE DISTRICT COURT, NOR REVIEWED BY THE APPEALS COURT, WHERE THE APPEALS COURT EXPRESSLY HELD THE DISTRICT COURT DID

NOT DECIDE THE ISSUE AND THEREFORE IT HAD NO APPELLATE JURISDICTION TO REVIEW THAT ISSUE.

There are two property interests involved here. One is the homestead property interest and the other is the homestead lawsuit property interest. The Minnesota Supreme Court's summary judgment, reached without having appellate jurisdiction on the issue, deprived petitioners of a hearing on their homestead lawsuit property which in turn deprived them of the return of their homestead property. The 14th amendment protects both property interests as does Minn. Const. Art I sec 7. The lawsuit property is protected by the procedural Due Process Clause of the 14th amendment, while the homestead property is protected by the substantive Due Process Clause of the 14th amendment. Homesteads are a fundamental right granted under the Minnesota Constitution and Minn. Stat. 510.01 (app.68) and therefore homestead protection in Minnesota is a substantive Due

Process issue. See Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (State-created rights are fundamental rights).

At the same time, and in view of the Minn. created homestead right, the right to "establish a home" is part of the liberty guarantee of the 14th amendment. See Board of Regents of State College v, Roth, 408 U.S. 564, 572 (1972).[1] The freedom of choice in matters of family life is also part of the liberty guarantee. Moore v. City of E, Clev., 431 U.S. 494 (1977). This also is guaranteed by Minn. Stat. 510.07 which states a person may leave his homestead and still protect it by filing notice per MS 510.07 (or being exempt from the filing requirement).

The Minn. S. Ct. lacked appellate jurisdiction to grant summary judgment since the issue was neither reached by the

---

[1] Cf. also the liberty-home-family-privacy penumbra nexus discussion in Greiswold v. Conn., 381 U.S. 479 (1965).

district court, nor reviewed by the Appeals Court. See Appeals Court opinion at p.6, app.12: "Our review is limited to those issues which were raised in and decided by the district court. Casey v. State Farm Mut. Auto. Ins. Co., 464 N.W.2d 736, 739 (Minn. App. 1991)." The district court did not decide the homestead issue. See Appeals Court opinion at p.4, app.8-9: "**APPELLANTS ARGUE THAT LOTS 35 AND 37 ARE THEIR HOMESTEAD...THE DISTRICT COURT DID NOT REACH THIS ISSUE...**"

It has been the law of due process since at least as early as 1803 that "(i)t is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." Marbury v. Madison, 5 U.S. 137, ____(1803), For the Minn. S. Ct. to reverse the Minn. App. Ct., on a reversal that the App. Ct. never made to begin with was a violation of petitioners' procedural due process rights which are incorporated and guaranteed by the 14th amendment. The standard of review for this Court is Strict Scrutiny because the Minn. Constitutionally guaranteed homestead

right is a substantive fundamental right."

The procedural due process deprivation was for the Minn. S. Ct. to grant summary judgment on an issue not decided by the district court below, and without the benefit of a full factual record. This due process procedural violation simultaneously deprived petitioners of their full and fair opportunity to be heard, access to the courts, and their substantive homestead right.

That appellate jurisdiction is totally dependant upon a decision by the district court is well established by this Court.

" The Minn. S. Ct. literally granted summary judgment on an incomplete factual record which neither the district court nor the App. Ct. decided nor reviewed. Summary judgment decisions are subject to de novo review and errors of due process law in general are de novo, however, because this error of due process did not exist until it reached the Minn. S. Ct. the deprivation of due process was committed by the highest court of review in Minnesota as regarding a fundamental right. Such a deprivation of an individual fundamental right at that level elevates this Court's standard of review to strict scrutiny. Cf. O'brien v. Skinner, 414 U.S. 524, 530 (1974).

See Marbury, supra. Where the district court has refused to decide an issue (as here) there has been no chance for the plaintiff to present his case. Consequently, if a reviewing court decides the issue on only the limited appellate record procedural due process has been denied. This has long been recognized by this Court, the lower federal courts, other state Supreme Courts, and the Minn. Supreme Court. See just a few random decisions and authorities below recognizing this principle of due process of law.

"A reviewing court must limit itself to a consideration of only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." Thayer v. American Financial, 322 N.W.2d 599, 604 (Minn. 1982). See also Thiele v. Stich, 425 N.W.2d 580, 582 (Minn.1988) (Same).

"However much the parties and this court are desirous of resolving the issues sought to be raised, a reviewing court must limit itself to a consideration of only those issues which the record shows were....presented and considered by the trial court in deciding the matter before it. Thompson v. Barnes, 200 N.W.2d 921, 927 (Minn.1972).

"The state trial court did not reach the issue, and a full record was not available to the Minnesota Court of Appeals ....(plaintiff) was not given a full opportunity to be heard." Chizmada v. Smiley's Point, 726 F. Supp. 249, 253 (Dist. Minn. 1989).

"Appellate jurisdiction is the power vested in an appellate court to review and revise the judicial action of an inferior court, evidenced by an appealable order or an appealable judgment rendered by such a court....Therefore, until such order or judgment is rendered, there is no basis or right of appeal." Trengen v. Mongeon, 200 N.W.2d 50, 53 (N. Dak. 1972). (Trengen is cited in Black's Law Dictionary, 5th ed.; West Pub.; 1979 under "appellate jurisdiction".

"In Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 66 L. Ed. 2d 571. 101 S. Ct. 669 (1981), the Court made it clear that an appellate court is powerless to hear a case unless there is a final judgment.....If the appellate court finds that the order from which a party seeks to appeal (is not final), its inquiry is over. A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition a jurisdictional ruling may never be made prospective only." Blazak v. Ricketts, 971 F2d 1408, 1411 (9th Cir.1992).

From its own long standing rulings the Minn. S. Ct. knew appellate jurisdiction is the cornerstone of appellate review as this Court recognized at its own inception. See Marbury, supra. The Minn. App. Ct.

correctly recognized this and petitioners ask this Court to grant certiorari on this issue and thereafter vacate the Minn. S. Ct.'s orders of 11-9-93 and 2-22-94 on the authority of the 14th amendment.

As the highest court of review in Minnesota the Minn. S. Ct. monopolizes justice. Because that Court made a factual finding without appellate jurisdiction to do so it has deprived petitioners of their 14th and 1st (see infra) amendment rights and has so far departed from the accepted and usual course of judicial proceedings that this Court could alternatively treat this question as a petition for an extraordinary writ (28 USC 1651(a)) per U.S. S. Ct. Rule 20.1 and 20.3. Petitioners now have no place to go for the enforcement of their rights, except for this Court. This Court historically enforces the Constitutional rights of individuals in situations such as this.

II

THE MINNESOTA SUPREME COURT DENIED PETITIONERS THEIR FUNDAMENTAL SUBSTANTIVE FIRST AMENDMENT RIGHT TO PETITION THE COURTS FOR REDRESS WHEN IT GRANTED SUMMARY JUDGMENT ON AN ISSUE NOT REACHED BELOW.

The Minn. S. Ct. denied petitioners their fundamental substantive 1st amendment right to petition the courts for redress. The 1st amendment is incorporated and guaranteed by the 14th amendment. It is also guaranteed by the Minn. Const. at Art I, sec.8. This is a fundamental substantive individual right and this Court's review is again strict scrutiny. The Minn. S. Ct. monopolizes justice in Minn. and by their procedural due process error they have 1.) denied petitioners access to the courts for 2.) a full and fair opportunity to be heard on the homestead issue. Since these are fundamental rights (i.e. homestead right and access the courts) procedural due process is protected and the standard of review is strict scrutiny. See Boddie v. Conn., 401

U.S. 371 (1971).

Petitioners sought redress in the district court, which **REFUSED** to rule on the homestead issue. Petitioner filed a motion to the district court asking that it rule on the homestead issue. The district court responded with a letter stating "Do not send me any more letters, motions, or briefs. Your case is over. Your only remedy is to appeal to the Court of Appeals. I will not be responding to anything else that you send." App.24. The appeals court recognized the district court's error and remanded for a hearing but the Minn. S. Ct., without appellate jurisdiction to do so, reversed that ruling. Besides being a due process violation, this was a deprivation of petitioners' 1st amendment right because it deprived petitioners of their right to petition the courts for 1.) a hearing, and 2.) redress. The homestead issue was not decided below, yet the Minn. S. Ct. has now foreclosed any possibility of petitioners ever being given a chance to seek redress on the homestead issue, unless this Court

vacates the Minn. S. Ct.'s order. Petitioners ask this Court to grant certiorari and thereafter vacate the Minn. S. Ct.'s order on 1st amendment grounds.

III

THE DECISION MADE BY THE MINNESOTA SUPREME COURT THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT WAS BOTH CONTRARY TO U.S. SUPREME COURT LAW GOVERNING SUMMARY JUDGMENT PROCEDURE, AND FACTUALLY IN ERROR WHERE THE RECORD SHOWS SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED FOR PLAINTIFFS, NOT DEFENDANTS.

Even if the Minn. S. Court had had appellate jurisdiction it made an error when it reversed the Minn. Court of Appeals' remand for a finding on an undecided factual issue. The Minn. S. Court found there was no genuine issue of material fact as to the claim that Lots 1035 and 1037 were Duane Larson's homestead property. That issue was not before the Court, but per Minn. Stat. 510.01 (1992) the only elements required to constitute a protected homestead property

are: 1.) ownership; and 2.) occupancy. App.68. The App. Ct. stated at p.4 of it's opinion "It is undisputed that appellants lived on lots 1035 and 1037 from 1980 until Duane's incarceration in 1985, even though appellants listed a different address on their tax returns" (i.e. a Mankato post office box). Duane did not abandon his home due to incarceration since Minn. Stat. 510.07 (app.69) protected his homestead for him while he was incarcerated. See Eustice v. Jewison, 413 N.W.2d 114, 118-9 (Minn.1987). See also App. Ct. decision at p.6, app.11-12. Petitioners swore they did not abandon their homestead in affidavits. App.47-51. Indeed petitioners carried fire insurance on the house at Lot 1037 on the very day the MDR seized it. App.59-63. Surely the state knew Duane owned the house and still occupied it because the State of Minnesota underwrote the fire insurance policy on it for Duane's insurance agent. Just prior to the 6-9-87 seizure Duane also notified the County of Le Sueur, with copies to the MDR, that he intended to return to

his house when he was released from prison. See dist. ct. at p.6, app.32.

At p.2, app.6 the App. Ct. opinion noted (as a matter of public record) that "Lot 35 (i.e. 1035) was held in the name of SPD Corporation, of which petitioners were the 100% owners." Consequently, both lots 1035 and 1037 were by definition petitioners' homestead.

Additionally, the district court itself found Lots 1035 and 1037 were OWNED by petitioners in it's order of 1-7-93 at p.3, para 1, where it stated: "SINCE SOMETIME IN 1980, PLAINTIFFS DUANE AND PAMELA LARSON WERE THE OWNERS OF CERTAIN PROPERTY DESCRIBED AS LOT #35 AND LOT #37, BLOCK 1, THUNDERBIRD HILLS, KASOTA, MINNESOTA. THEIR OWNERSHIP OF LOT #37 WAS PURSUANT TO AN UNRECORDED DEED." App.28. See also p.5 at app.32. See this deed in the appendix hereto at app.64-6. The MDR itself noted on it's tax liens "Lawrence and Theresa Larson as NOMINEES for Duane and Pamela Larson."

See App. Ct. decision at p.5, app.10. Consequently, both ownership and occupancy were acknowledged below, even though the issue was not specifically decided by the district court. As a matter of law the Minn. S. Ct. has long held that a deed need not be recorded to protect a homestead if the creditor had notice of alleged ownership. Oxborough v. St. Martin, 170 N.W. 707, 708 (1919). The MDR had notice as held by the App. Ct. at p.5, app.10. But moreover, the MDR not only knew the homestead was owned by Duane, they seized if BECAUSE they knew it was owned by Duane and because Duane refused to voluntarily transfer it to the MDR. See Hulwi letter of 4-10-87 at app.57-8. Further, it has long been held that failing to claim homestead tax status (i.e.MS 273.124) is not determinative of natural homestead status (i.e. MS 510.01). See Lieberman Music Co. V. Hagen, 404 N.W.2d 290, 292 (Minn. App.1987). The only possible genuine issue

of material fact on ownership which could require a hearing is whether Duane owned Lot 37. That is, can he produce the original notarized executed deed? OF COURSE HE CAN. See app.64-6.

While the district court erroneously granted summary judgment for the state based on civil rights qualified immunity grounds, the district court disputed neither ownership nor occupancy. Dist ct. at p.3, app.28-9, and app. ct. at pp.2,4, app.6,9. The App. Ct. simply remanded the case to the district court for a finding on ownership and occupancy because the district court had not reached that issue. App. Ct. p.6, app.12. The remand was not because the App. Ct. found a disputed genuine issue of material fact, but rather it was for the district court to make a finding where it had not done so. Logic overwhelms regardless. If Duane did not own the homestead, why would the MDR take it for his taxes? If someone else owned the property

the MDR would not have taken it for Duane's income taxes. This fact alone says Duane owned it and it has never been disputed that petitioners lived there until Duane was incarcerated. Per MS 510.01 natural homestead is established by such a record. INDEED, THE APP. CT. FOUND: "THERE IS SUFFICIENT EVIDENCE FOR A COURT TO FIND THAT PRIOR TO DUANE'S INCARCERATION, LOTS 35 AND 37 WERE APPELLANTS' HOMESTEAD." P.5, APP.10.

The only other possible issue is abandonment. The burden of proving abandonment was on the MDR to prove by clear and convincing testimony of abandonment. App. Ct. p.5 (app.10-11). See Hickman v. Sutherland, 23 N.W.2d 593, at 597 (Minn.1946) ("The homestead right ....cannot be deprived... without clear and convincing testimony of abandonment. Abandonment...results when the owner removes therefrom ...with the intention of never returning.."). Also Vickery v. First Bank of LaCrosse, 368 N.W.2d 758 (Minn.App.1985) (same). Abandonment is generally accepted

to be voluntary departure and no intent to ever return. Cf. In Re Peterson, 897 F2d 935, 939 n.8 (8th Cir.1990). Involuntary commitment cannot be construed as voluntary departure nor abandonment and it waives the non-abandoned notice required by MS 510.07. See Jewison, supra, at 118-119. Also Muscala v. Wirtjes, 310 N.W.2d 696, 698 (Minn.1981) citing Millet v. Pearson, 173 N.W.2d 411 (Minn.1919); also In Re Joy, 5 B.R. 681, 683-4 (1980); also In Re Hoffman, 354 N.W.2d 581, 583 (Minn.App.1984).

An unrecorded deed does not defeat the homestead protection. Sisco v. Paulson, 45 N.W.2d 385, 387 (Minn.1950). See also In Re Haggerty, 448 N.W.2d 353, 367 (Minn.1989) (C.J. Popovich) ("The primary rationale for the homestead exemption is to secure the home against the uncertainties and misfortunes of life.."). Haggerty re-affirmed 123 years of unbroken caselaw holding the homestead laws to be constitutional; citing generally In Re

Johnson, 880 F2d 78, 79, 82-3 (8th Cir.1989) (J. Heaney). Homestead protection does not touch upon qualifications of moral character. Id. at p.83, See also Denzer v. Prendergast, 126 N.W.2d 440, 444 (Minn.1964) (HOMESTEAD PROTECTION EXTENDS TO THE CRIMINAL AND IMMORAL AS WELL). Failure to actively seek to remove an invalid judgment does not waive one's homestead rights. See Beigler v. Chamberlin, 176 N.W. 49, 50 (Minn.1920).

The standard of review on summary judgment is de novo, but since that review here protects fundamental, substantive, and individual rights the standard of review is strict scrutiny. Viewing the evidence in favor of petitioners as the nonmoving parties regarding the MDR's granted cross motion for summary judgment, it can be seen that the MDR had not carried their burden of proving abandonment in view of: 1) Duane's involuntary removal from his home when he was sent to prison on 6-25-85; 2) the

exception to MS 510.07 for incarcerated people; 3) THE FACT THAT DUANE HAD AN IN-FORCE FIRE INSURANCE POLICY ON THE HOUSE ON THE VERY DAY IT WAS SEIZED; 4) petitioners' refusal to voluntarily relinquish ownership of their home to the MDR in response to the MDR's request to petitioners' attorney that they do so (app.57-8); 5) petitioners' letters to the county and MDR informing them petitioners intended to return to their homestead after Duane was released from prison app.32; 6) petitioners' affidavits (app.47-56) and a legion of other known facts which show petitioners did not abandon their homestead. When viewing petitioners as the moving party the Minn. S. Ct. should have, in fact, ruled that the homestead must be returned as seized in violation of state law and Minnesota Constitution Art.I, sec.12."

The facts in the limited record show

" Leaving the MDR to appeal on appellate jurisdiction grounds.

the following: Duane told the federal Bureau of Prisons pre-release team on 1-14-87 that he intended to live at 1037 TB Hills, Rt. 1, Kasota upon his release from prison. On 4-10-87 MDR agent Sanft called petitioners' attorney, Jim Hulwi, to ask if petitioners would voluntarily transfer ownership of their home to the MDR. App.57-8. This shows that as of two months before the MDR seized the home **THE MDR KNEW PETITIONERS HAD NOT ABANDONED THEIR HOME OR ELSE THE MDR WOULD NOT HAVE ASKED THEM TO VOLUNTARILY TRANSFER OWNERSHIP OF IT.** Petitioners insured their home from 7-29-86 through 7-29-87, extended to 11-13-87. App.59-61. This insurance was placed through the **MINNESOTA PROPERTY INSURANCE PLACEMENT FACILITY**. This proves petitioners had not abandoned their home. The state knew this **BECAUSE THE STATE UNDERWROTE THE INSURANCE POLICY FOR THE INSURANCE COMPANY ON PETITIONER'S HOUSE!** Duane again informed the BOP on 5-13-87 that he intended to move

back to his home at 1037 TB Hills, Rt 1, Kasota, MN.. It is a matter of fact that petitioners did not abandon their home. (Who would abandon a fully paid for 12 year old home?). The MDR has not produced one sentence of testimony reflecting abandonment as required by Hickman.

Further, regarding ownership, in Oxborough v. Martin, 170 N.W. 707 (Minn.1919) it was held that in cases where a homestead owners' rights are protected by an unrecorded deed "it (is) incumbent on both the judgment creditor and the subsequent purchaser to inquire as to his rights..." p.708. "Such inquiry would have disclosed the unrecorded deeds...." which protected the homestead. p.708. "We must take it for granted that he would have disclosed (the unrecorded deed) fact had proper inquiry been made." p.708. This refers to property law "inquiry notice". **THE STATE MADE NO ATTEMPT TO INQUIRE BUT RATHER CHOSE TO PRETEND DUANE ABANDONED HIS HOME BECAUSE HE WAS INCARCERATED.**

The facts show the MDR knew petitioners owned their homestead. The MDR seized it because petitioners owned it. On the

certificate of seized property recorded on 10-1-87 the MDR listed petitioners as the OWNERS. They also knew petitioners occupied their homestead. They allege petitioners abandoned it because they knew petitioners occupied it. By the legal definition of abandonment petitioners could not have abandoned their home because Duane did not leave his home voluntarily AND PETITIONERS WOULD NOT HAVE INSURED A HOME THEY HAD ABANDONED WITH NO INTENTIONS OF EVER RETURNING TO IT. At a minimum the state was on "inquiry notice" but had constructive and actual notice as well that Duane owned, occupied, and had not abandoned his homestead. See Hentges v. P.H. Feely & Sons, 436 N.W.2d 488, 492 (Minn.App.1989).

In view of these facts it can be seen that the Minn. S. Ct. acted contrary to this Court's summary judgment standards. "A district court MUST resolve any factual issues of controversy in favor of the non-moving party...in the sense that where the

facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied." Lujan v. Nat. Wildlife, 110 S.Ct. 3177, 3188-89 (1990). A disputed genuine issue of material fact means "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "If reasonable minds could differ as to the import of evidence".. summary judgment should be denied. Id. 251. SURELY REASONABLE MINDS COULD DIFFER HERE BECAUSE THE APP. CT. FOUND: "THERE IS SUFFICIENT EVIDENCE FOR A COURT TO FIND THAT PRIOR TO DUANE'S INCARCERATION, LOTS 35 AND 37 WERE APPELLATE' HOMESTEAD." P.5, app.10.

The Minn. S. Ct. procedurally erred when it granted defendants' cross motions for summary judgment on a review it had no appellate jurisdiction to make, but moreover it erred by misapplying this Court's rules

on summary judgment.[11] See Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). The moving party must show "there is an absence of evidence to support the nonmoving party's case" (p.325) while the nonmoving party must merely "designate specific facts showing there is a genuine issue for trial." "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." (p.324). The record evidence shows there surely is a genuine issue of material fact when viewing petitioners as the nonmoving party. But when viewing petitioners as the moving party the Minn. S. Court should have, in fact, granted petitioners' motion for summary judgment, not defendants'. At the very least a grant of summary judgment is to be reviewed in the most favorable light to the one ruled against. Johnson v. Group Health, 994 F2d 543, 545 (8th Cir.1993).

As acknowledged in numerous Minn. S. Ct. cases the fundamental homestead right is

---

[11] The Minn. S. Ct. has adopted this Court's rules and caselaw on summary judgment. Mn.R.Civ.P. Rule 56 is literally verbatim to F.R.Civ.P. Rule 56.

a deeply rooted tradition in Minnesota and that right is implicit in the concept of ordered liberty in that state. Therefore it is zealously protected. See federal appellate court Judge Heaney's summary in In Re Johnson, supra, 880 F2d at pp.78,79, and 82-3. Also see In Re Haggerty, supra, 448 N.W.2d 353 (C.J. Popovich). See also Beigler v. Chamberlin, 176 N.W. 49 (Minn.1920). "IT IS NOT NECESSARY TO PROTEST THE LEVY. THE DEFENDANT COULD IGNORE IT AND IGNORE A SALE UPON AN EXECUTION ON ANY JUDGMENT THAT COULD BE ENTERED...AND AFTERWARDS ASSERT HIS HOMESTEAD RIGHT.." "THE STATUTE GIVES THE EXEMPTION ABSOLUTELY, AND WITHOUT MAKING THE RIGHT TO IT DEPENDENT UPON ANY AFFIRMATIVE ACTION UPON THE PART OF THE PERSON CLAIMING IT TOWARDS AN OFFICER LEVYING OR ABOUT TO LEVY UPON IT." p.50.

Homestead rights are substantive fundamental rights in Minnesota and the deprivation of a fundamental right by a state is prohibited by the Due Process Clause of the 14th amendment. The standard of review for this Court is Strict Scrutiny. Petitioners ask this Court to grant certiorari and thereafter hold that both as

a matter of law, and fact, the Minn. S. Ct. deprived petitioners of their 14th amendment rights.

IV

PETITIONERS WERE DENIED EQUAL PROTECTION OF LAW IN VIOLATION OF THE 14TH AMENDMENT.

Even when this case is viewed as an Equal Protection issue under the Equal Protection Clause of the 14th amendment the Minn. S. Ct. was in error. The two groups here are petitioners, and all other Minn. homestead owners. There is no meaningful difference in these two groups therefore the state's action cannot survive rational basis review. Since petitioners are not a suspect, nor quasi-suspect, class the review is rational basis. Cf. NY City Transit Auth. v. Beazer, 440 U.S. 568, 593 (1979). It can easily be seen that petitioners were treated differently from other homestead owners of Minnesota as proven in the

numerous Minnesota homestead cases." It is the law of Equal Protection that like people must be treated alike under like circumstances unless the government has ANY conceivable basis for different treatment. Here the state of Minnesota has NO CONCEIVABLY rational basis for depriving petitioners of their homestead in violation of their own homestead laws. Therefore, under Equal Protection rational basis review petitioners are entitled to the return of their homestead. The Minn. S. Ct.'s 110 word order reversing the appeals court remand was arbitrary, capricious, lacking in appellate jurisdiction, and result oriented. Such is the essence of Equal Protection violations. A naked desire to harm petitioners by taking their homestead is not a legitimate state interest. Cf. U.S. Dept.

" If petitioners were a suspect class this case would be on point with Yick Wo v. Hopkins, 118 U.S. 351 (1886) (Discriminatory administration of laws against an unpopular class).

of Ag. v. Moreno, 413 U.S. 528 (1973). Nor is unjust enrichment for the state a legitimate government interest.

V

THE MINN. COURTS NOW ERRONEOUSLY REQUIRE AN EXHAUSTION OF ADMINISTRATIVE REMEDIES PRIOR TO FILING A 42 USC 1983 ACTION AND FURTHER HAVE MISINTERPRETED THE QUALIFIED IMMUNITY PROTECTION SET OUT IN ANDERSON V. CREIGHTON BY FINDING THE STATE AGENTS' SUBJECTIVE SELF-SERVING BELIEF THAT PETITIONERS HAD ABANDONED THEIR FULLY PAID FOR HOME WHEN DUANE WAS SENT TO PRISON ENTITLED THEM TO QUALIFIED IMMUNITY WHERE MINN. LAW, IN FACT, HOLDS THE BURDEN OF PROOF OF ABANDONMENT IS ON THE AGENTS TO PROVE BY CLEAR AND CONVINCING EVIDENCE.

The standard of review for this 42 USC 1983 claim is again strict scrutiny because fundamental homestead rights are at stake. The district court held that since petitioners had failed to exhaust state administrative remedies prior to filing

their 42 USC 1983 civil rights claim against the state agents, their civil rights action could not be maintained. Dist. ct. opinion at p.10, app.39. This is grossly erroneous and directly contrary to this Court's holding in Felder v. Casey, 487 U.S. 131 (1988). For this reason alone this Court could grant certiorari in order to clarify that an exhaustion of administrative remedies is not required before filing a 42 USC 1983 action. The Wisconsin and Oregon cases cited on by the district court do not stand for the proposition the district court cited them for. In erroneous reliance on these cases the district court has now incorrectly decided a federal question and set precedent in Minnesota for an exhaustion of remedies in DIRECT CONFLICT WITH U.S. SUPREME COURT LAW.

The district court also found the state employees had qualified immunity because it was reasonable for them to believe Duane had abandoned his fully paid for $350,000 home,

with 3 fire places and a swimming pool, because he was not living in it, and he had not filed a homestead claim after he went to prison pursuant to Minn. Stat. 510.07. Dist. ct. pp. 13-14, app.43-4. **THE REASON DUANE WAS NOT LIVING IN HIS HOUSE WAS BECAUSE HE WAS IN PRISON**. The reason he did not file a non-abandoned homestead claim per MS 510.07 was because Minn. law clearly says incarcerated people **ARE NOT REQUIRED TO DO SO.** See Jewison, supra, 413 N.W.2d at 118-9. The App. Ct. did not discuss the exhaustion of remedies issue, but it did agree that the employees had qualified immunity. Pp.7-8, app.14-15. The Minn. S. Ct. simply affirmed without comment.

At p.7 the App. Ct. misinterpreted the qualified immunity good faith defense. There is a great deal of difference between the type of situation cited by the App. Ct. in Elwood v. Co. of Rice, 423 N.W.2d 671, 674-5 (Minn.1988) where an officer made a hasty decision that a person's safety was in

danger and exigent circumstances existed to justify a warrantless search; and the leisurely calculated decision made by the MDR in this case that petitioner had abandoned his fully paid for home **AFTER** he was sent to prison yet **AFTER** he refused to voluntarily turn his home over to the MDR. See app.57-8. For the instant case qualified immunity turns on an "objective (albeit fact-specific) question whether a reasonable officer would have believed.." (Elwood p.675) that Duane had abandoned his home. The MDR made **NO ATTEMPT** to inquire if Duane had abandoned his home, but the MDR did know the following. Duane wrote a letter from his jail cell asking the Minn. attorney general for a copy of the homestead laws in October, 1985. This request was denied **FOR THE EXPLICIT REASON THAT THE MDR WAS IN TAX LITIGATION WITH PETITIONERS.** "

" This was not a legitimate reason to deny copies of public law to a prisoner. Even though Duane was exempt from filing a non-abandoned homestead claim per MS

MDR agent Sanft examined the title track for the homestead and saw Duane paid Miester Construction $24,338.21 after Duane was sent to prison so as to release a mechanic's lien against his home at 1037 TB Hills. Sanft reviewed the county attorney's files where he saw Duane's letter stating petitioners intended to return to their home. The MDR learned on 3-3-86 that petitioners were not listing their home for sale, even though their other properties had been listed. On 11-13-86 the STATE OF MINNESOTA insured 1037 TB Hills for petitioners. App.61. THIS IS CONCLUSIVE EVIDENCE THAT THE STATE KNEW PETITIONERS HAD NOT ABANDONED THEIR HOMESTEAD. LOGIC SAYS PETITIONERS WOULD NOT HAVE INSURED A HOME THEY HAD ABANDONED. On 4-10-87 Chris Sanft ASKED PETITIONERS TO

510.07, had the Minn. Atty Gen. sent him the law and Duane became aware of MS 510.07 he would have filed it anyway. Federal prisons do not have state law books in them so Duane was unaware of MS 510.07 until years later because of the Min. Atty. Gen's refusal to send him copies of the homestead law.

VOLUNTARILY TRANSFER TITLE OF THEIR HOME TO THE STATE. App.57-8. THIS REQUEST SHOWS THE MDR KNEW PETITIONERS HAD NOT ABANDONED THEIR HOME. Duane twice informed legal counsel for the MDR, one Neil Scott, that he INTENDED TO RETURN TO HIS HOMESTEAD. THE LETTER OF 4-18-87 SAYS: "IT IS AND HAS BEEN MY HOMESTEAD".[11] Sanft was later referenced in the Mankato Free Press newspaper on 12-18-87 as saying the MDR was selling DUANE LARSON'S HOME IN THE TB HILLS ADDITION NEAR KASOTA, MN.

Per Harlow v Fitzgerald, 457 U.S. 800, 818 (1981); "(i)f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." P.819. THE OFFICIAL MUST "PROVE that he neither knew nor should have known....(by) objective factors" (p.819). "By defining the

---

[11] Had the MDR simply made an inquiry with the federal Bureau of Prisons, the most logical starting point to inquire, it would have learned Duane intended to return to his homestead at 1037 Thunderbird Hills, Rt. 1, Kasota, Minnesota. The BOP records reflected this. Or, even easier, they could have asked Duane. The MDR asked neither.

limits...in objective terms, we provide no license to lawless conduct." The test is not what the state knew but what it "SHOULD HAVE KNOWN", and what it can PROVE. See also Anderson v. Creighton, 483 U.S. 635, 637-9 (1986). The MDR made no attempt to "PROVE" that it neither knew, nor should not have known, that petitioners owned, insured, and had not abandoned their home. The MDR made no attempt to inquire of Duane's intentions whatsoever. Had they done so they needed look no further than their own state offices to learn that the State of Minn. underwrote the fire insurance for petitioners' home. THERE CAN BE NO MORE CONCLUSIVE PROOF OF NON-ABANDONMENT THAN TO CARRY INSURANCE ON THE HOUSE, SHORT OF LIVING IN IT, BUT DUANE COULD NOT LIVE IN IT BECAUSE HE WAS IN PRISON. The state's decision to feign believed abandonment was no more than an attempt to shift the burden of proof to petitioners, as is often done by administrative tax agencies when fundamental

substantive rights are not involved. In the instant case, however, the burden did not shift. Per Harlow and Hickman v. Sutherland, 23 N.W. 593, 597 (1946) the burden of proof of abandonment rested squarely with the MDR and the courts below erred to find such proof was carried by a simple subjective assertion that the MDR believed the house was abandoned. "SUBJECTIVE BELIEFS ARE IRRELEVANT." Creighton, supra, 483 U.S. at 641. Even from prison Duane paid for fire insurance on his home and refused to turn over title to his home to the MDR when the MDR. The seizure of petitioners' home was a de jure act by the MDR.

VI

THE MINN. COURTS VIOLATED PETITIONERS' PROCEDURAL DUE PROCESS RIGHTS BY GRANTING SUMMARY JUDGMENT STATING THE STATE'S OWN AUCTION BID OF $66,500 IN 1990-1992 WAS THE FAIR MARKET VALUE FOR PROPERTY WHICH HAD A REAL FAIR MARKET VALUE OF $124,000 WHEN IT

WAS SEIZED BY THE STATE IN 1987, BUT WHICH THEREAFTER WAS NEGLECTED BY THE STATE AND LEFT TO DETERIORATE IN VIOLATION OF MS 270.71 UNTIL ITS VALUE BECAME THE SCRAPE VALUE OF $61,500.

This issue is still an undecided question for this Court. That is, since there are no substantive state granted homestead rights for these properties, does the 14th amendment still guarantee procedural due process? For the reasoning discussed in Boddie v. Conn., supra, petitioners believe it does. Yet this Court has never addressed this question directly. Petitioners suggest this case provides a good opportunity for the Court to do so.

On November 6, 1992 the district court ruled orally from the bench during the hearing on summary judgment that the fair market value of petitioners' properties was considered by the district court to be a disputed fact. The court did so as Duane started to explain in open court that the

MDR's auction bids cannot reflect fair market value. Yet the judgment of 1-7-93 at pp.14 held the MDR's bids did reflect fair market value. Petitioners took exception to this by informing the court on 1-18-93 that had the court not orally ruled on 11-6-92 that a disputed fact existed Duane would have pointed out to the court as follows:

It is undisputed by the MDR that petitioners had agreed to sell their lake cabin for $55,000 only days before the state seized it in 1987. Rent was paid to the state on the lake cabin for 2 years thereafter, and then the cabin sat empty until June, 1991 when it was sold by the state for $30,000. Petitioners received none of the rent.

Rescom Realty valued the farm property at $29,900 on 3-26-87. Petitioners were offered $27,000 for the Rapidan farm on 6-1-87. On 11-19-87 the state itself valued the farm at $29,700. But by 3-10-89 the state valued the farm at $12,000 <u>DUE TO</u>

DETERIORATION. The MDR had refused to allow petitioners to sell the farm in 1987 and it sat empty until 1990 when it was sold by the MDR for $13,000.

The fair market value was first set at $29,900 on 3-26-87 and then $28,000 in May, 1987 for the house at 402 W. Humphrey, by Rescom Realty. On 11-19-87 the state itself valued this house at $31,100. But by 3-10-89 the state valued this house at $24,500. The MDR had also refused to allow petitioners to sell this property in 1987 and also left this property abandoned until 1-15-92 when they sold it for $14,448.85.

The Mt. Kato land was purchased for $9,000 in 1979 but was sold for just $2,000, 10 years later in 1989 by the MDR. The homestead was a $350,000 home, as determined by the IRS and the state during 1983-1985, yet it was sold by the MDR for only $97,700 to police officers (less $28,000 in improvements) in 1988.

The above figures reflect the fair

market value. The MDR's bid of $66,500 does not. Fair market value is "What a willing buyer would pay in cash to a willing seller" at the time of the taking. U.S. v. 564.54 Acres, 441 U.S. 506, 511 (1979); also State v. Strom, 493 N.W.2d 554, 558-9 n.3 (Minn.1992). Petitioners seek certiorari and thereafter a remand for trial on the fair market value of the properties because petitioners' procedural due process rights were denied where the Minn. courts simply held that the state's bid reflected fair market value without taking any evidence on the matter.

Further, the App. Ct. erred when it stated at p.8, app.15 that the management of petitioners' property was discretionary thereby providing qualified immunity from 42 USC 1983 actions. The preservation of the property was not discretionary but rather was regulated by MS 270.71. See app.68. This was plain error.

VII

THE MINN. COURTS ABUSED THEIR POWER AND DISCRETION THROUGHOUT THIS CASE EVEN TO THE POINT OF PUNISHING PETITIONERS FOR SEEKING THE RETURN OF THEIR HOME IN ACCORD WITH 125 YEARS OF HOMESTEAD LAW.

The district court abused its discretion to impose sanctions. Sanctions are inappropriate where the action is filed "upon belief...a pleading... is warranted by existing law or is a good faith argument for changing existing law and filed for proper purposes only." Uselman v. Uselman, 464 N.W.2d 130, 142 (Minn.1990). Petitioners demonstrated a good faith belief they are entitled to the return of their homestead based on over 125 years of existing homestead law which. The court is to decide if sanctions are warranted based on "whether the pleading, motion, or other paper was based on a plausible view of the law." Id. Surely it is plausible, in view of the century old law of Minnesota, that petitioners had a right to seek the return

of their homestead. See Cont. Swed. Corp. V. M/V Nan Fung, 719 F.Supp. 1202, 1217 (S.D.N.Y.1989) (a good faith filing based on law precedents precludes sanctions). F.R.Civ.P. and Minn.R.Civ.P. Rules 11 are the same. See Uselman, at 142.

Moreover, at p.24 of petitioners' complaint petitioners explained they were naming the Hilligoss' and Van Rossums ONLY as necessary parties per M.R.Civ.P. Rule 19.01 as required due to their present owner status. INDEED THE DISTRICT COURT ITSELF FOUND ON 10-12-92 AT P.4 OF ITS MEMO THAT THE HILLIGOSS' AND VAN ROSSUMS "HAD TO BE NAMED" PER RULE 19.01.

Petitioners also challenged the Bona Fide Purchaser defense of these defendants. Minnesota is a "race notice" state as applies to BFP law. See Minn. Stat. 507.34 (1990). In interrogatories the Hilligoss' admitted they knew Duane was the former owner and occupier of the homestead until he went to prison. In view of this the

Hilligoss' had both constructive and inquiry notice of petitioners' homestead rights. See Hentges, supra, 436 N.W.2d at 492 (constructive notice of inconsistent rights deprives protection of MS 507.34). In cases where a homestead owners' rights are protected by an unrecorded deed "IT (IS) INCUMBENT ON BOTH THE JUDGMENT CREDITOR AND THE SUBSEQUENT PURCHASER TO INQUIRE AS TO HIS RIGHTS.." Oxborough, supra, 170 N.W. at 708. See also Harper v. Paradise, 210 S.E.2d 710 (Ga.1974) (inquiry notice). See also R. Cunningham, W. Stoebuck, D. Whitman, The Law of Property, (Student Ed. 1984); sec. 11.9-10.

The Van Rossums did suspect petitioners had an interest in the property. They filed an action to determine adverse claims against 1035 TB Hills. Duane responded to the Van Rossums' counsel and informed him the property was owned by him (i.e. through SPD Corp.) but it was seized against petitioners' will by the state. The Van

Rossums' thereafter were not bona fide purchasers because they then had actual, constructive, and inquiry notice.

Sanctions were inappropriate in this case because: 1) petitioners' claim is warranted by existing law; 2) Rule 19.01 required naming the property owners; and 3) the property owners were not bona fide purchasers because they both lacked good faith and had notice. The Hilligoss', in particular, it must be remembered are both police officers. They know the law of Minnesota and were aware of Duane's incarceration. But in addition to this, there is something profoundly unsettling about a state seizing a citizen's home while that citizen is in prison and then selling it to its own police at a very reduced price. It smacks of police buddy nepotism and chronyism. To be a BFP the subsequent purchaser must have been made in good faith. Under these facts one cannot find good faith on the part of any state employee, including

State Highway Patrolman Mr. Hilligoss.

Petitioners do not attempt to impose on the patience of this good Court for matters as trivial as small monetary sanctions. But these sanctions reflect the very essence of the overall hostility and prejudice with which this legitimate claim was met. Without any conclusive evidence of taxes owed, the state seized petitioners' home while Duane was in prison, then sold it to its own police officers at a fraction of its value and gave petitioners the "Bum's Rush" out of the courthouse, with sanctions, for their attempt to assert their fundamental homestead rights. See Minn. Const. Art. I sec 11: "no conviction shall work...forfeiture of estate"; yet this is what actually happened.

CONCLUSION

The Minn. courts have legalized their state's unconstitutional acts by exonerating the state at every turn and have upheld the state's unjust enrichment at the expense of

petitioners' homestead. This is the type of behavior the 14th amendment and 42 USC 1983 can correct. It is not supposed to matter if a petitioner takes his claims to state or federal court, but in this case it is easy to see the state protected its own. Unless this Court grants certiorari these fundamental individual rights deprivations will go uncorrected. The MDR's actions violated the Constitution from the outset, but the latest fundamental rights violations came from the very S. Ct. of Minn. itself. Petitioners ask this Court to grant certiorari and thereafter remand this case. Thereafter petitioners also ask the Court to retain jurisdiction as long as it deems necessary so as to assure a fair result on remand. For example, if remanded, the district court may read the Minn. S. Ct.'s ruling as a signal that an erroneous factual finding will nevertheless be upheld on

appeal." "The Constitution protects ALL individuals... from the abuse of governmental power.." Planned Parenthood of SE Penn. v. Casey, 112 S. Ct. 2791, ____ (1992).

This petition is pro se, however, if certiorari is granted, attorney Francis Lee Goodwin, of Sioux City, Iowa will argue before this Court for petitioners.

Dated: Respectfully:

4-20-94 Donald K. Faison

4-20-94 Diane D. Faison

" Perhaps this Court will decide it wants a decision from the U.S. Tax Court before it decides whether or not to grant certiorari. See n.6, supra.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DUANE AND PAMELA LARSON, Petitioners

v.

CHRISTOPHER G. SANFT, ET AL, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITIONERS' APPENDIX

Duane and Pamela Larson
Pro Se
22261 Clearbrook
Mission Viejo, CA 92692
Phone: (714) 830-6025

TABLE OF CONTENTS

APPENDIX

Document:	Pages:
Minnesota S. Ct. order (2-22-94)	1
Minn. S. Ct. order (11-9-93)	2-3
Minn. Appeals Ct. opinion (9-7-93)	4-23
Minn. Dist. Ct. letter order (1-27-93)	24
Minn. Dist. Ct. order (1-7-93)	25-46
Duane Larson affidavit (8-11-92)	47-51
Duane Larson affidavit (10-26-89	52-54
Pamela Larson affidavit (10-26-89)	55-56
Attorney Hulwi/Larson letter (4-10-87)	57-58
Homeowners insurance policy (7-29-86)	59-63
Warranty Deed to D & P Larson (5-16-80)	64-66
Relevant federal and state law	67-69

STATE OF MINNESOTA

IN SUPREME COURT

C5-93-575

Duane Wendall Larson and Pamela A. Larson, husband and wife, et al.,

Appellants,

vs.

Christopher G. Sanft, et al.,

Respondents,

Dan Hilligoss, et al.,

Respondents,

County of LeSueur, et al.,

Respondents,

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that Duane Wendall and Pamela A. Larson's petition for rehearing be, and the same is, denied.

Dated: February 22, 1994

BY THE COURT

_____

Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT
C5-93-575

Duane Wendall Larson and Pamela A. Larson, husband and wife, et al.,

Appellants,

vs.

Christopher G. Sanft, et al.,

Respondents,

Dan Hilligoss, et al.,

Respondents,

County of LeSueur, et al.,

Respondents,

AMENDED ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that upon the petitions of Duane W. and Pamela A. Larson and the State of Minnesota, we review only that portion of the unpublished decision of the court of appeals reversing the summary judgment entered in favor of the defendants with regard to the plaintiff Duane Larson's claim that Lots 35 and 37 were his homestead property.

Our review of the record indicates that there exist no genuine issues of material fact in that regard and that a remand for further proceedings is not warranted. See Minn. Stat. § 510.01 (1992). Accordingly, we reverse that portion of the court of appeals' decision remanding to the district court and deny the petitions for further review in all other respects.

Dated: November 9, 1993

BY THE COURT:

_____

Chief Justice

NOTICE: MEDIA AND COUNSEL ARE PROHIBITED FROM MAKING THIS OPINION OR ORDER PUBLIC PRIOR TO 12:01 A.M. ON THE FILE DATE APPEARING BELOW

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480a. 08, subd. 3 (1992).

STATE OF MINNESOTA

IN COURT OF APPEALS

C5-93-575

La Sueur County
District Court File No. C1-92-153

Amundson, Judge
Concurring in part, dissenting in part,
Short, Judge

Duane Wendall Larson and
Pamela A. Larson, husband
and wife, et al.,

Appellants,

Pro Se
22261 Clearbrook
Mission Viejo, CA 92692

vs.

Christopher G. Sanft, et al.,

Respondents,

Hubert H. Humphrey, III
Attorney General
Thomas K. Overton
Assistant Attorney General
10 River Park Plaza
St. Paul, MN 55146

Dan Hilligoss, et al.,

Respondents,

Paul H Tanis, Jr.
MacKenzie & Gustafson Ltd.
424 South Minnesota Avenue
St Peter, MN 56082

County of Le Sueur, et al.,

Respondents,

James G. Golembeck
Mary P. Rowe
Jardine, Logan & O'Brien

2100 Meritor Tower
444 Cedar Street
St. Paul, MN 55101

Filed September 7, 1993
Office of Appellate Courts

Considered and decided by Amundson, Presiding Judge, Schumacher, Judge, and Short, Judge.

UNPUBLISHED OPINION

AMUNDSON, Judge

Appellants allege their property was illegally seized and sold by the state to pay back income taxes.

Appellants raise numerous issues in challenging the grant of summary judgment for the state, the county and the third-party purchasers. We affirm in part and remand.

FACTS

In 1980, appellants Duane and Pamela Larson purchased a home in Kasota, Minnesota referred to as "Lot 37." They later purchased an adjoining parcel of land referred to as "Lot 35." Duane Larson's parents, Lawrence and Theresa Larson, were made the nominee holders of Lot 37. Lot 35 was held in the name of SPD Corporation, of which appellants were the 100% owners. Appellants claim to have an unrecorded deed to Lot 37 from Duane's patents. Appellants were also the owners of lake cabin and farm property through nominee holders.

In 1983, Duane was charged with drug trafficking. He was later convicted and sentenced to fifteen years in federal prison. It is undisputed that Duane lived on Lots 35 and 37 until he was sent to prison on June 25, 1985. Around October 1985, Pamela and the parties' two children moved off Lots 35 and 37.

On August 19, 1985, Duane pleaded guilty to tax evasion charges. As part of the plea agreement, Duane conceded the accuracy of the criminal tax computations for 1978, 1979, and 1980. However, Duane was not "required to admit that the income upon

which he evaded tax was from illegal narcotics trafficking." Additionally, Duane did not contest his beneficial ownership of the above-described properties.

On August 21, 1985, the state, through the Minnesota Department of Revenue (DOR), filed its first tax lien on Lots 35 and 37 in Le Sueur County. Liens were later filed on the lake cabin and farm property. On May 20, 1986, the Minnesota Tax Court affirmed these assessments. The DOR eventually filed a Notice of Seizure and Sale and a Notice of Levy on each of the properties and sold them at public auction. Lot 37 was eventually sold to respondents Dan and Linda Hilligoss and Lot 35 to respondents Randy and Karla Van Rossum.

Duane was released from prison in December

1991. He and Pamela commenced this present action in June 1992, arguing that Lots 35 and 37 are their homestead, thus the state had no authority to seize and sell the property. Appellants also alleged civil rights violations and that the DOR failed to preserve the value of their property prior to its sale. Additionally, appellants named Le Sueur County and various county officials as defendants for conspiring to accept documents for filing that allowed the state to sell the properties.

The district court granted summary judgment for all respondents. Appellants challenge the grant of summary judgment for each respondent and also argue the court erred in denying their motion to amend the complaint and in imposing Rule 11 sanctions.

DECISION

I. Return of Alleged Homestead Property

Appellants argue that Lots 35 and 37 are their homestead, and thus the state had no authority to seize and sell the property. Appellants seek the return of Lots 35 and 37, or in the alternative,

damages.

The district court did not reach this issue in granting summary judgment for the state. The court stated that it was irrelevant whether the property was appellants' homestead because the state employees had qualified immunity. We disagree with this analysis. While qualified immunity may protect the state employees from damages for violation of constitutional rights, that issue is distinct from whether the state had the legal authority to seize and sell appellants' property.

A homestead is "[t]he house owned and occupied by a debtor as his dwelling place, together with the land upon which it is situated." Minn. Stat. § 510.01 (1984). The homestead exemption is a constitutional right. See Minn. Const. art. I, § 12. Strong public policy supports the statutory provisions regarding the homestead exemption. Denzer v. Prendergast, 267 Minn. 212, 216-18, 126 N.W.2d 440, 443-44 (1964).

It is undisputed that appellants lived on Lots 35 and 37 from 1980 until Duane's incarceration in 1985, even though appellants listed a different address on

their tax returns. Lot 37 was held in the name of nominees, Duane's parents, Lawrence and Theresa Larson. There is, however, allegedly an unrecorded deed issued to

appellants from the nominees dated May 16, 1980. An unrecorded deed of a homestead is valid as against a judgment creditor who had notice thereof before the land became subject to the judgment. Oxborough v. St. Martin, 142 Minn. 34, 35, 170 N.W. 707, 708 (1919). The state was at least aware of appellants' claimed ownership because the Notice of State Tax Lien listed the taxpayers as "Lawrence A. Larson and Theresa Larson as nominees for Duane Larson and Pamela larson."

Based upon the record, there is sufficient evidence for a court to find that prior to Duane's incarceration, Lots 35 and 37 were appellants' homestead. The fact appellants did not previously claim homestead status is not determinative. See Lieberman Music Co. v. Hagen, 404 N.W. 2d 290, 292 (Minn. App. 1987). Once a homestead right is

established, the burden shifts to the creditor to establish abandonment by clear and convincing evidence. Vickery v. First Bank of LaCrosse, 368 N.W.2d 758, 763 (Minn. App. 1985), pet for rev. denied (Minn. Aug. 20, 1985).

If Lots 35 and 37 were appellants' homestead, the property did not lose its homestead status due solely to Duane's incarceration. Under Minn. Stat. § 510.07 (1984), a homestead owner who does not occupy a homestead for six consecutive months shall be deemed to have abandoned the homestead and therefore loses the exemption, unless within that period, the owner files a homestead preservation notice. It is undisputed that appellants did not file such a notice in this case. Accordingly, it is clear that Pamela abandoned the homestead in 1985.

-5-

It is sufficient for one spouse to possess the homestead exemption. Minn. Stat. § 510.04 (1984). Thus, Pamela's abandonment of the homestead does not conclusively change the exempt nature of the property since it could have remained Duane's homestead. See

Eustice v. Jewison, 413 N.W.2d 114, 118-19 (Minn. 1987) (taxpayer did not abandon homestead because he was "under a legal disability" while absent from his home for nearly eight years due to incarceration in jail and an involuntary hospital commitment); see also Millet v. Pearson, 143 Minn. 187, 189, 173 N.W. 411, 412 (1919) (person in jail has not abandoned homestead due to the involuntary nature of the absence). Thus, Duane's mere absence from Lots 35 and 37 does not necessarily mean the property lost its homestead status.

Our review is limited to those issues which were raised in and decided by the district court. Casey v. State Farm Mut. Auto Ins. Co., 464 N.W.2d 736, 739 (Minn. App. 1991), pet. for rev. denied (Minn. Apr. 5, 1991). Therefore, we remand to the district court for a determination whether Lots 35 and 37 were Duane's homestead at the time they were seized and sold by the state. If on remand the district court determines Lots 35 and 37 were not Duane's homestead, the court may simply affirm its prior determination that the state acted within its authority and followed all the proper

procedures in seizing and selling the property. If, however, the court, determines Lots 35 and 37 were Duane's homestead, the issue of whether the state had the authority to seize and sell the property become more complicated.

-6-

The statutes in Minnesota are not clear on whether the state had the authority to seize and sell homestead property to pay back income taxes once a lien attached. Compare Minn. Stat. § 510.05 (1984) (homestead exemption shall not extend to "any valid lien for taxes") with Minn. Stat. § 270.69, subd. 3 (Supp. 1985) (lien imposed for taxes is not enforceable against the homestead of the taxpayer). Additionally, there are no Minnesota appellate cases on this issue. Based upon the constitutional nature of the homestead exemption, it is questionable whether the state had such authority. We need not, however, make such a determination in this case. Resolution of the issue would be premature and ultimately may not be necessary to the decision in this case. Accordingly, if the district court determines Lots 35 and 37 were

Duane's homestead, it will also need to determine whether the state had the legal authority to seize and sell the property.

II. 42 U.S.C. § 1983

The district court properly determined that appellants may not maintain a cause of action under 42. U.S.C. § 1983 (1982).

Qualified or "good faith" immunity is an affirmative defense available to public officials sued for damages under section 1983. Elwood v. County of Rice, 423 N.W.2d 671, 674 (Minn. 1988) (citing Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S. Ct. 2727, 2736 (1982)). The existence of qualified immunity is a question of law. Id. at 675.

Whether qualified immunity exists turns on whether the official violated a clearly established statutory or constitutional

right, the existence of which a reasonable person would have known. Elwood, 423 N.W.2d at 674-75. Qualified immunity should be recognized if officials of reasonable competence could disagree on the issue.

See id. at 675.

In that present case, even though state officials may have erroneously seized Lots 35 and 37, it was not unreasonable for them to conclude appellants had abandoned their homestead. Therefore, the state employees are protected by qualified immunity. Accordingly, we do not reach the issue of whether appellants needed to exhaust their state administrative remedies before bringing a section 1983 action.

III. Diminution in Value of Property

Appellants allege the state failed to preserve the value of the seized properties as required by Minn. Stat. § 270.71 (1984). The district court found the DOR did not under-bid the properties. This finding is not clearly erroneous. See Minn. R. Civ P. 52.01. Since the land was sold at a public auction, it is reasonable to assume the properties were sold at a fair value.

Additionally, the management of the property was largely discretionary, thereby bringing the actions of state officials within the doctrine of official immunity. See Johnson v. Morris, 453 N.W.2d 31, 41-42 (Minn. 1990). There is no credible evidence that state

officials intentionally committed any act they reasonably believed to be prohibited that resulted in waste to the properties. See Rico v. State, 472, N.W.2d 100, 107 (Minn. 1991). Thus, the state officials are protected by the doctrine of official

immunity.

IV. Le Sueur County

Appellants allege Le Sueur County officials conspired to take away their homestead. Appellants contend the county employees willfully aided and abetted the sale of Lot 37 by accepting documents for filing that were drafted by and for the state and that enabled the state to seize and sell the property.

Appellants' argument is without merit. The county was under an affirmative obligation to record the instruments since they affected real property and were properly signed, executed and acknowledged. See Minn. Stat. § 386.39 (1984). There is no evidence to suggest the documents prepared by the state were in any way improperly prepared and the county itself did not seize any property. Thus, the county

employees executed their duties according to the law. Moreover, no credible evidence exists to support appellants' conspiracy theory. Therefore, the district court properly granted summary judgment for the county and its employees.

V. Third-Party Purchasers

Respondents Dan and Linda Hilligoss purchased Lot 37 and Randy and Karla Von Rossum purchased Lot 35 after the respective redemption periods had expired. We agree with the district court that the Hilligosses and Van Rossums are bona fide purchasers and have title clear, free, and superior to any subsequent judgment against the state. See Minn. Stat. § 270.705, subd. 2 (1986) (certificate of sale operates as a "conveyance of all the right,

title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the state of Minnesota attached thereto").

Even if the state improperly seized the property, there is no legal basis for requiring the Hilligosses or Van Rossums to forfeit the property.

See Huitink v. Thompson, 95 Minn. 392, 394, 104 N.W. 237, 238-39 (1905) (even though property was fraudulently foreclosed upon, subsequent purchaser in good faith and for valuable consideration was protected by the recording acts and had the right to rely upon the record title).

Therefore, appellants' remedy for the alleged illegal seizure is money damages only. Accordingly, the district court did no err in granting summary judgment for the Hilligosses and Van Rossums.

VI. Amendment of Complaint

The district court denied appellants' motion to amend their complaint to add various tort claims. Permitting or refusing to amend a pleading is within the sound discretion of the district court. TCF Bank & Sav. v. Marshall Turss Sys., Inc., 466 N.W.2d 49, 54 (Minn. App. 1991), pet. for rev. denied (Minn. Apr. 29, 1991). An amendment to a complaint may properly be denied when the additional alleged claim cannot be maintained. Hunt v. University of Minn., 465 N.W.2d 88, 95 (minn. App. 1991).

The district court properly determined that

appellants' tort claims cannot be maintained. See Minn. Stat. § 3.736, subd. 3(c) (1986) (the state and its employees are not liable for "any loss in connection with the assessment and collection of taxes").

Accordingly, the district court did not abuse its discretion in denying the motion to amend.

The court also properly denied appellants' motion to amend their complaint to add a claim for punitive damages. The decision to allow an amendment to assert a claim for punitive damages is within the district court's discretion and will not be reversed absent an abuse of that discretion. Utecht v. Shopko Dep't Store, 324 N.W.2d 652, 654 (Minn. 1982). The facts in this case "do not abuse support an allegation of willful and wanton misconduct." See Minn. Stat. § 549.20 (1984). Therefore, the district court did not abuse its discretion in denying the motion.

VII. Collectibilty of the State's Tax Liens

Appellants argue the district court erred in refusing to rule specifically on the collectibility of the state's tax liens. It is implicit, however, in the district

court's order that the grant of summary judgment for the state effectively denied appellants' motion to release the tax liens.

In any event, at the time the state filed it liens in 1985, Minn. Stat. § 270.69, subd. 4 (Supp. 1985) provided that a lien imposed for taxes shall be "enforceable from the time the lien arises and for ten years from the date of filing the notice of lien." While it is questionable whether the DOR could collect upon the liens under Minn. Stat. § 270.70 (Supp. 1985), we are not asked to decide that question. Clearly, under section 270.69, subdivision 4 the liens are valid for ten years. Accordingly, the district court did not err in refusing to declare the state's tax liens unenforceable.

VIII. Rule 11 Sanctions

Appellants argue the district court erred in ordering them to pay $750 in Rule 11 sanctions to Le Sueur County and $750 to both the Hilligosses and the Van Rossums.

Rule 11 sanctions are a mechanism for deterrence rather than a punitive or cost-shifting

device. Uselman v. Uselman, 464 N.W.2d 130, 142 (Minn. 1990). The standard is one of reasonableness under the circumstances. Id. at 143. A Rule 11 determination is reviewed under an abuse of discretion standard. Id. at 145.

The district court found the action against Le Sueur County was brought in bad faith and unsupported by the facts or the law. As to the Hilligosses and Van Rossums, the district court found the complaint was neither well-grounded in fact nor warranted by existing law. These findings are not clearly erroneous. Therefore, the district court did not err in ordering Rule 11 sanctions against appellants. We decline, however, to award the Hilligosses and Van Rossums their requested attorney fees incurred in this appeal.

IX. Motion to Strike

The Hilligosses and Van Rossums have filed a motion to strike portions of appellants' brief as outside the record. Similarly, the state has moved to strike portions of appellants' brief and appendix.

The record on appeal consists of "[t]he papers

filed in the trial court, the exhibits, and the transcript of the proceedings,

if any." Minn. R. Civ. App. P. 110.01. It appears appellants have included documents that were not before the district court. These documents, however, have not been considered by this court in making its decision. Therefore, we deny motions to strike as unnecessary.

Affirmed in part and remanded.

Dated: August 31, 1993

_____

Judge Roland C. Amundson

SHORT, Judge (concurring in part, dissenting in part).

I respectfully dissent on the homestead issue. The record demonstrates: (a) Lot 37 was owned and twice mortgaged by an Iowa resident, Lawrence Larson; (b) the property never was classified as a homestead for property tax purposes; (c) appellants listed a Mankato office box address and stated they lived in Blue Earth County, not LeSueur County, on their tax returns; (d) appellant husband stipulated in a plea agreement that Lot 37 was owned in the name of the S.P.D. Corporation; (e) appellant wife abandoned the property in 1985; (f) when the property was seized in 1987, appellants made no claim or protest to the tax department; and (g) in 1987, the property had been vacant almost two years and was in disrepair. Under these facts, there is no reason to remand on the issue of whether Lot 37 was a homestead. See Minn. Stat § 510.01 (1992) (defining homestead for purposes of exemption). I would affirm the trial court's decision.

January 27, 1993

Duane Larson
22261 Clearbrook
Mission Viejo, CA 92692

Dear Mr. Larson:

Do not send me any more letter, motions, or briefs. Your case is over. Your only remedy is to appeal to the Court of Appeals. I will not be responding to anything else that you send.

Michael A. Young
Judge of District Court

cc Paul Tannis
James Golembeck
Tom Overton
Robert Greising

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF LESUEUR FIRST JUDICIAL DISTRICT

Duane Wendall Larson, et al, Court File No. C1-92-153

Plaintiffs,

vs. ORDER

Christopher G. Sanft, et al,

Defendants.

The above entitled matter came on for hearing before the undersigned on the 7th day of November, 1992, at the Le sueur County Courthouse in Le Center, Minnesota. The matter was before the Court on the Plaintiff's motion for summary judgment, and motion to amend their complaint to include various other torts, and for punitive damages. Defendant County of Le Sueur and its employees and Defendant State of Minnesota and its employees requested summary judgment in their responsive briefs. Defendant County of le Sueur also requested Rule 11 sanctions in its responsive brief. The Court had under advisement the motion of Defendants Hilligoss

and Van Rossum for Rule 11 sanctions.

Duane Larson appeared pro se. Attorney Robert Greising appeared on behalf of Larson but did not participate in arguing the motions. Larson argued the motions and drafted all briefs and other papers filed with the Court. James Golembeck appeared on behalf of Le Sueur County and its employees, Robert Richter, David Sexe, Terry Overn, and Harry Christian. Tom Overton

appeared on behalf of the State of Minnesota and its employees, Christopher Sanft, Jerry McClure, Randy Becker, and Neil Scott.

of (sic).

ORDER

1. Plaintiff's motion for summary judgment is DENIED in all respects.

2. Defendant County of Le Sueur and its employees are GRANTED Summary Judgment in full against Plaintiffs.

3. Defendant State of Minnesota and its employees are GRANTED Summary Judgment in full

against Plaintiffs.

4. Plaintiffs' motion to amend their complaint to include the torts of conversion, gross negligence, trespass, waste, abuse of process, violation of public policy, prima facie tort, willful, wanton, and reckless negligence, negligent supervision, and for exemplary and punitive damages is DENIED in full.

5. Defendant County of Le Sueur and its employees are awarded $750.00 in attorneys fees pursuant to its Motion for sanctions under Rule 11.

6. Defendants Hilligoss are awarded $750.00 and Defendants Van Rossum are awarded $750.00 pursuant to their request for sanctions under Rule 11.

7. The attached memorandum is incorporated herein and constitutes the Court's findings of fact and conclusions of law.

Dated: December 30, 1992. BY THE COURT:

_____

Michael A. Young

Judge of District Court

I hereby certify that the within Order constitutes the Judgment of this Court.
Dated: January 7, 1993 Patrick J. O'Meara
(Court Seal)
Court Administrator

MEMORANDUM By:

Deputy

Since sometime in 1980, Plaintiffs Duane and Pamela Larson were the owners of certain property described as Lot #35 and Lot #37, block 1, Thunderbird Hills, Kasota, Minnesota. Their ownership of Lot #37 was pursuant to an unrecorded deed. In 1985, Plaintiffs reported tax due on $350,000.00 of income. This income tax was never paid, and the State imposed jeopardy tax assessments against these properties for

the years 1978, 1979, 1980. State tax liens was filed in Le sueur County, Nicollet County, and Blue Earth County, and notice of such was sent to Plaintiffs' post office box address in Mankato.

From June 25, 1985, until December 12, 1991, Plaintiff Duane Larson was incarcerated in the Sandstone Prison for failure to pay income tax on income derived from drug trafficking. From the time of incarceration, neither Plaintiff Duane Larson nor his wife and children continued to reside at the Lot #37 Thunderbird Hills' house. It sat empty and fell into a severe state of disrepair. Plaintiffs allege that Lot #37 was their homestead,

and would have continued to be their homestead had Duane Larson not been incarcerated.

On May 20, 1986, the tax lien matter was taken to the Tax Court. Neither Plaintiffs not their attorneys appeared. Plaintiffs were found to be in default, and judgment was awarded to the State. On August 6, 1987, all property was sold at a public auction to the Minnesota Department of Revenue. After the

redemption period had expired, Lot #37 was sold to the Defendants Hilligoss, and Lot #35 was sold to the Defendants Barry Braun, who then sold the property to the Defendants Van Rossum.

Plaintiffs bring this summary judgment motion before the Court pursuant to Rule 56 of the Minnesota Rules of Civil Procedure. Contrary to Plaintiffs' contention, this Court can indeed grant summary judgment for "either party", moving or the non-moving party. A cursory reading of the Rule so indicates. Defendants need not also have filed a motion for summary judgment ten days before the hearing in order for the Court to grant summary judgment in their favor as the non-moving party.

THE COUNTY OF LE SUEUR

Plaintiffs allege, by way of Duane Larson's deposition, that the County is being sued on the basis that it willingly aided and abetted and expedited the sale of the Lot #37 property by accepting for filing at the Registrar of Deeds' Office documents drafted by and for the State of Minnesota which would enable the State to seize and sell Plaintiffs' property.

The facts are undisputed. The County, through its employees, did indeed accept for filing the pertinent documents drafted by the State which then enabled the State to seize and sell Plaintiffs' property.

The law is also clear in this matter. Pursuant to Minn. Stat. §386.39, the County Recorder's duties are as follows:

> Except were otherwise expressly provided by law, no county recorder shall record any conveyance, mortgage or other instrument by which any interest in real estate may be in any way affected, unless the same is duly signed, executed and acknowledged according to law;. . .

Properly prepared, signed, executed, and acknowledged documents are to be recorded. Period. There was nothing to indicate that the documents provided by the State were in any way improperly prepared. The County employees executed their duty according to law. There was no conspiracy. There is nothing to indicate a conspiracy. No legal basis has been alleged to support a theory of conspiracy.

Plaintiffs also allege that the County should not have filed the State's seizure notices since it knew the

property was homestead property. (Plaintiff cites Minn. Stat. § 510.01 for the proposition that homestead property is exempt from seizure for unpaid income taxes.) There are no facts to indicate that the County knew the property was allegedly Plaintiffs' homestead at the time the documents transferring title to the State were recorded. Plaintiffs had an unrecorded deed and all property tax statements were sent to Lawrence Larson, the record owner. The property never had a homestead tax exemption.

-5-

Plaintiffs sent two letters to the County inquiring as to the possibility of acquiring homestead tax status on the vacant property in question. The County twice responded by stating that ownership and occupancy were required and that there was nothing on file to indicate that Duane Larson was the owner of the properties in question. Understandably, the County denied Plaintiffs a homestead tax exemption on vacant property which was not on file as being deeded to Duane Larson. Plaintiff even admits that there was nothing on file with the County that had his name on

it. This course of action cannot be construed as puting the County on notice that the property in question was allegedly Plaintiffs' homestead.

Lastly, Minn. Stat. § 466.03 subd. 5 exempts the County and its employees from tort liability.

> Any claim based upon an act or omission of an officer or employee, exercised in due care, in execution of a valid or invalid statute, charter, ordinance, resolution or rule is excepted from liability.

There are no facts to indicate a lack of due care on the part of the County's employees, and there is nothing to indicate any malicious intent on their part, since the County Defendants have never even met or spoken with Plaintiffs.

Summary judgment on behalf of the County of Le Sueur and its employees Robert Richter, David Sexe, Terry Overn, and Harry Christian is granted.

These Defendants have moved for Rule 11 sanctions and costs and attorneys' fees against Plaintiffs on the basis that Plaintiffs had no cause of action upon which relief could be

granted and that the suit against them was frivolous.

Rule 11 sanctions are appropriate. Plaintiffs' complaint against the County and its employees is neither well grounded in fact nor supported by existing law.

Plaintiff Duane Larson may be pro se, but he is nevertheless held to the same standards as one who represented by counsel. Furthermore, Duane Larson makes much of his credentials as a certified legal assistant and a law student. He knows more about the legal process than the average pro se party as evidenced by his briefs, motion papers, and string citations. In on instance he holds himself out as learned in the applicable law in this matter, and the next minute he makes an argument which is obviously spurious upon a cursory reading of a statue or the most superficial of research. Mr. Larson indeed knows how to generate paper in a lawsuit. His naming of the County and its employees in this suit are indicative of his desire to blow this matter out of proportion. Alleging conspiracy on the facts of this case is absolutely unsupported by the facts or the law. Mr. Larson has repeatedly evidenced an ability to do

extensive legal research on an issue, but only when it promotes his own position. This indicates a lack of good faith on his part. Attorney's fees in the amount of $750.00 are awarded the County.

DEFENDANTS HILLIGOSS AND VAN ROSSUM

The Defendants Hilligoss and the Defendants Van Rossum who purchased the Plaintiffs' property after the redemption period had expired, had moved this court of the 23rd of September, 1992,

for Summary Judgment and costs and attorneys fees pursuant to Rule 11. Summary Judgment was granted in their favor, and the issue of Rule 11 sanctions was taken under advisement.

These Defendants are entitled to sanctions under Rule 11. The pleadings and arguments of Plaintiffs indicate no bad faith by the Hilligosses or Van Rossums or any other possible theory for return of Plaintiffs' property from these bona fide purchasers. Plaintiffs want their house back, and pursuant to this desire, the named Defendants Hilligoss and Van Rossum as parties to the suit. An

examination of the law as applied to the facts alleged in this case clearly indicated that Plaintiffs have no legal basis for the return of the property in question. Plaintiffs' pleading with respect to these Defendants is neither well-grounded in fact nor warranted by existing law. Rule 11 sanctions are appropriate. Defendants Hilligoss are awarded $750.00. Defendants Van Rossum are awarded $750.00.

THE STATE OF MINNESOTA

Plaintiffs are suing the State of Minnesota and its employees in both their official and individual capacities for alleged violations of their civil rights under 42 U.S.C. §1983, for violation of their Federal Due Process rights, and for other actions Plaintiffs characterize as intentional torts.

Civil Rights Violations

Plaintiffs allege that their civil rights were violated by the seizure and sale of their property by the State of Minnesota

and its employees. title 42 U.S.C. §1983 provides as

follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

The state and its employees (sued in their official capacities) are not "persons" for purposes of §1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304 (1989). Thus, the State and its employees sued in their official capacities are immune from suit under its provisions. Summary Judgment in favor of the State and those employees sued in their official capacities is granted.

This leaves the State employees who are sued in their individual capacities. As to them, suit against them in their individual capacities is proper, procedurally speaking. Hafer v. Melo, 520 U.S. _, 112 S.Ct. 358 (1991). However, Plaintiffs' suit against these Defendants fails on other grounds.

In order to state a claim for relief under §1983,

Plaintiffs must allege some violation of federal law which the court can consider and determine. Plaintiffs allege their due process rights were violated by being held in default when neither they nor their attorneys appeared at the hearing before the tax court. Their due process rights were fully vindicated. All Plaintiffs were entitled to was a notice of the hearing and an opportunity to be hear. It is undisputed that notice was properly sent to

and received by Plaintiffs. Duane Larson, although he was incarcerated at the time, chose not to move for a change of venue to Sandstone Prison. The hearing was duly held, but neither Plaintiffs' nor their two attorneys appeared. Duane Larson makes vague allegation of legal malpractice against his former counsel. This, however, does not detract from the reality that notice and a hearing was duly granted to Plaintiffs. Procedural due process was afforded Plaintiffs. If they now allege that the default judgment should be vacated on the grounds of legal malpractice, this is not the forum for their complain.

Section 1983 requires that a party first exhaust his state administrative remedies prior to bring (sic) suit in State District Court. While this issue is one of first impression in this state, nevertheless there is a significant body of case law from other states so interpreting this federal statute. Nutbrown v. Munn, 811, P.2d 131 (Or. 1991) cert. denied, __ U.S. __, 112 S.Ct. 867 (1992): Hogan v. Musolf, 471 N.W.2d 216 (Wis. 1991), cert. denied, __U.S.__, 112 S.Ct. 867 (1992).

The Wisconsin court in Hogan concluded that federal law requires exhaustion of state remedies prior to a § 1983 suit provided that state remedies are plain, adequate and complete.

Plaintiffs have failed to avail themselves of the state's administrative remedies that are plain, adequate and complete. Plaintiffs never appealed to the Commissioner alleging an error in filing after the liens were filed against the property. Plaintiffs never brought a quiet title action. Plaintiffs never

brought a claim for release of the property pursuant to Minn Stat. §270.701 subd. 7 & 12 after the property

was seized. Plaintiffs also took none of these actions during the period from June 1987 when the property was seized to November of 1988 when it was sold to third parties. Plaintiffs never moved to vacate the tax court judgment, nor did them attempt to appeal it. Not only did Plaintiffs fail to exhaust their state administrative remedies, they simply didn't avail themselves of them at all. Section 1983 cannot now be used to replace these avenues of redress.

The policy behind this is simple. Minnesota has a compelling interest in the efficient administration and collection of taxes. Minnesota statutes express a clear intent that the Commissioner of Revenue be afforded notice and an opportunity to correct errors before the taxpayers are allowed to proceed to court. Certainty in tax collection is necessary for the continued function of government. This certainty is lost if taxpayers are allowed to change midstream the statutorily mandated forum for review. Plaintiffs have failed to exhaust their state administrative remedies, and therefore they cannot maintain a cause of action under §1983 against the state employees in their

individual capacities.

Additional, the doctrine of qualified immunity applies to these state employees. Government officials performing discretionary functions have qualified immunity shielding them from civil liability as long as their actions could "reasonably

have been though to be lawful." Johnson v. Morris, 445 N.W. 2d 563, 566 (Minn. Ct. App. 1990) citing Anderson v. Creighton, 483 U.S. 635, 637-639, 107 S.Ct. 3034, 3038, (1987). Whether the employee defendants protected by qualified immunity may be held personally liable for allegedly unlawful action "turns on the 'objective reasonableness' of the conduct assessed in light of the legal rules that were 'clearly established'" at the time. Johnson, at 566, citing Harlo v. Fitzgerald, 457 U.S. 800, 818 (1981).

The first alleged misconduct was in obtaining the Tax Court judgment affirming the commissioner of Revenue's assessment of income taxes against Plaintiffs were entirely reasonable. Plaintiffs allege that the court case had to be proved with them

present and could not be "defaulted" against them. Plaintiffs cite Dougs v. Commissioner, 899 F.2d 164, 168 (2nd Cir. 1990) for the proposition that a default judgment could not be entered against them. This is simply untrue. Plaintiffs have misconstrued the case. Douge did not deal with a party who failed to appear at the tax hearing and was then declared to be in default, nor does the dicta indicate that a finding of tax fraud cannot be entertained without the taxpayer's presence at the hearing.

The law is clear. When a party fails to show for a hearing, he is deemed to be in default, and judgment is entered accordingly. Minn. Stat. §271.06 subd. 6 expressly provides that

if no appellant appears at trial, the Tax Court shall affirm the order of the Commissioner. Defendants acted reasonably in obtaining the Tax Court judgment.

However, assuming for the sake of argument that the Tax Court Judgment was incorrectly procured, nevertheless Plaintiffs have availed themselves of the wrong forum to challenge the judgment. The Tax

Court Judgment is res judicata and cannot be collaterally attacked in this Court. If Plaintiffs desire to challenge that judgment, they must first move to vacate that judgment in Tax Court. Their claim that the default judgment was improperly granted cannot now be raised with this Court.

The second allegation of misconduct is the seizure and sale of Lot 37, Plaintiffs' alleged homestead. The Defendant employees reasonably seized that property under the entirely reasonable assumption that the homestead has been abandoned. Duane Larson went to prison on June 25, 1985, and remained through December 12, 1991. It was seized on June 9. 1987, and by Plaintiffs own affidavits, it had been vacant for just a dew days less than two years at the time of this seizure. During this time, no notices were ever filed by Plaintiffs to notify the State that the property was still being claimed as homestead. A homestead tax exemption had never been acquired even though Plaintiffs now allege that it was their homestead since 1980.

The property was sold to the Department of

Revenue on August 6, 1987. On November 2, 1988, it was sold to third parties. Yet it was not until June of 1989 that Plaintiff Duane

Larson first argued that Lot #37 was his homestead. Whether Lot #37 was or was not Plaintiffs' homestead is irrelevant because the State and its employees reasonably believed it not to be. The State simply had not been put on notice that this was allegedly Plaintiffs' homestead until after the property was seized and sold by the Department of Revenue. Qualified immunity applies to the State and its employees.

The third alleged misconduct involves other properties of Plaintiffs' which were seized and sold by the Department of Revenue. In addition to their complaint that the Tax Court Judgment was improperly procured, they also allege that the value of the properties decreased or that the selling prices of the properties were low because of neglect or reckless disregard of the Department.

As explained previously, the Tax Court

Judgment was properly obtained. With regard to these claims of waste, Qualified Immunity applies because the Department acted reasonably in its sale of the properties. The Department bid price $66,5000 for the properties. When they we sold to third parties, the aggregate selling prices was approximately $61,500. It is evident that the Department did not under-bid the properties since it was not able to obtain as high of a price on the market as it paid to begin with. Summary judgment for the State and its employees (in their individual and official capacities) is appropriate.

Tort Claims

Plaintiffs allege that the actions of the State employees

constitute intentional torts. Nothing further is specified.

Minn. Stat. §3.736 subd. 3 states in relevant part as follows:

> Without intent to preclude the courts from finding additional cases where the state and its employees should not, in equity and good conscience, pay compensation for personal injuries or property losses, the legislature declares that the state and its employees are not

liable for the following losses:

(c) a loss in connection with the assessment and collection of taxes.

Upon a common sense reading of this provision, this court comes to the inevitable conclusion that the State and its employees are immune from any tort claims for property loss Plaintiffs allegedly have suffered due to the State's seizure and sale of Plaintiffs' property in connection with Plaintiffs' failure to pay income taxes.

For this reason also, Plaintiffs' motion to amend their complaint to include the torts of conversion, gross negligence, trespass, waste, abuse of process, violation of public policy, prima facia tort, and willful, wanton, and reckless negligence, and negligent supervision is denied. Furthermore, Plaintiffs' motion to amend their complaint to include a claim for exemplary and punitive damages is denied since the facts do not support an allegation of willful and wanton misconduct.

M.A.Y.

IN THE

FIRST DISTRICT COURT

LE SUEUR COUNTY

STATE OF MINNESOTA

LARSON et al PLAINTIFFS	CASE # C1-92-153
V.	AFFIDAVIT
SANFT et al DEFENDANTS	

Duane Larson swears under oath, deposes and says:

I am Duane W. Larson, and I have personal knowledge of the facts herein set forth. This affidavit is submitted in support of the Plaintiffs' motion for summary judgement for the purpose of showing that there is no genuine issue as to any material facts, and Plaintiffs are therefore entitled to judgement as a matter of law.

(1) I owned the homestead property at issue in

this complaint.

(2) This homestead was seized by the state of Minnesota, when the state defendants herein knew it was my homestead, and then it was transferred to the state by the Le Sueur County named defendants after I had informed Le Sueur County it was my homestead and that I intended to return to it when I was no longer incarcerated.

(3) I owned the properties referred to in the complaint as "Other Property" which were also seized and sold by the state of Minnesota.

(4) All properties were seized in response to a default judgement entered by the Minnesota Tax Court, case # 4463, due to a failure to appear at the tax court trial by either myself or my two hired attorneys.

(5) I was incarcerated on the day of tax court and did not learn I was defaulted due to a failure to appear by my attorneys until long after the tax court trial.

(6) Before the properties were seized I informed the state that I had been told by my attorneys that there was an agreement made between the state and my attorneys to pro rate the state tax based upon the federal tax determination as to be decided in the federal tax court trial. I was not aware of the default until 1987.

(7) The state seized and sold my property knowing I had been misled by my attorneys, and knowing I had been defaulted without first being afforded any meaningful hearing as guaranteed by due process. They also did so knowing I had been defaulted without first being afforded any meaningful hearing as guaranteed by due process. They also did so knowing I was not even aware I had been defaulted in the tax court until I received the letter from Chris Sanft dated August 20, 1987 which informed me of this for the first time. The state knew I believed there to be an agreement through the numerous letters I wrote to some of the herein named state defendants, and also to the tax court judge, and to

the tax court clerk. Consequently, Sanft wrote his letter of clarification to me on August 20, 1987.

(8) Before the Other Property was sold by the state it sat abandoned and unattended for years which resulted in deterioration and great lose (sic) in value in blatant violation of Minn. Stat. sec 270.71.

(9) I had made an agreement with Mr. and Mrs. Sheppard, through Cummisky Realty Co., during July and August of 1987 to sell them my lake home for $55,000. The state knew of this agreement and seized this property on August 3, 1987. The state did not expedite the sale of this property however, but instead sold this property to Dale Cattryse in June 1991 for $30,000.00

(10) See also Minnesota Tax Court affidavits from 1989 attached hereto.

Dated: 8-11-92

Duane W. Larson

STATE OF MINNESOTA

TAX COURT

RAMSEY COUNTY

DUANE WENDALL LARSON and PAMELA ANN LARSON PETITIONERS V. THE COMMISSIONER OF REVENUE RESPONDENT	DOCKET #4463 AFFIDAVIT OF DUANE WENDALL LARSON

I Duane Larson, being duly sworn on oath do depose and state as follows:

(1) The house seized and sold by the Minnesota Department of Revenue at 1037 Thunderbird Hills, Kasota, MN, was our home from 1980-1985. I learned in late 1985 that our homestead was protected by the Minnesota Constitution. My family planned to return to our home and I so informed the Minnesota Department of Revenue and the Le Sueur County auditor of this.

(2) During 1985 and 1986 I paid the fire insurance on 1037 Thunderbird Hills, I also paid the plumber for house repairs thereto, and I complained to the Le Sueur

County Sheriff's Department when my neighbors broke into my house. I did all of this while incarcerated and I did so in order to preserve our home.

-1-

(3) On June 23, 1989 at approximately 9:45 a.m. Chris Sanft of the Minnesota Department of Revenue came to Duluth Federal Prison Camp to serve a boat seizure notice on me. During this visit, I asked Mr. Sanft why he felt he had the authority to seize and sell our home. He said he had done so because (a) the house was going to be seized for back property taxes anyway, and (b) I had abandoned it. I replied that I had been sent to prison, I had not abandoned it, and further I had informed the Minnesota Department of Revenue of my intentions to return to my home. I also said his belief that the house was to be seized for back property taxes was not correct and amounted to nothing more than speculation on his part. Mr. Sanft did not deny being aware that I had informed the Minnesota Department of Revenue of my intention to return to our home.

(4) Mr. Sanft acknowledged that he knew the house at 1037 Thunderbird Hills was our home. Mr. Sanft

also acknowledged that the property tax seizure when Mr. Sanft seized the house for an income tax payment.

(5) Mr. Sanft surprisingly then asked me not to raise the homestead issue in Court, after I had informed him I intended to move the Court for vacation of the default judgement.

_____

Duane W. Larson

Dated this 26th day of October, 1989.

Subscribed and Sworn before me this 26th day of October, 1989.

_____

Notary of Public
Pamela A. Larson
Notary Public, Blue Earth County, MN.
My commission expires 4-6-92

STATE OF MINNESOTA

TAX COURT

RAMSEY COUNTY

DUANE WENDALL LARSON and PAMELA ANN LARSON PETITIONERS V. THE COMMISSIONER OF REVENUE RESPONDENT	DOCKET #4463 AFFIDAVIT OF DUANE WENDALL LARSON

I Pamela Larson, being duly sworn on oath do depose and state as follows:

(1) The house at 1037 Thunderbird Hills, Kasota, MN, was the home, and homestead, of our family. We lived there from 1980 until Duane went to prison in 1985. Both our children were born while we lived there and they had never know any other home before Duane went to prison.

(2) In late 1985 or early 1986 Duane and I learned that our homestead was protected by the Minnesota Constitution. We had planned to return to our home when Duane came home from prison.

_____

Duane W. Larson

Dated this 26th day of October, 1989.

Subscribed and Sworn before me this 26th day of October, 1989.

_____

Clair Niesen
Notary of Public

April 10, 1987

Mr. Duane W. Larson
P.O. Box 1000 A
Sandstone, MN 55072

Dear Duane:

I received a telephone call from the Minnesota Department of Revenue inquiring as to whether you would be willing to transfer title to the Thunderbird Hills home to the Minnesota Department of Revenue at this time. Back taxes on the property would be paid by the Department of Revenue in order to allow a deed from you to the Minnesota Department of Revenue to be recorded.

I am advised by the Department of Revenue that they believe there are now some perspective purchasers of this property and they feel a sale of the property could most easily be forthcoming if the property were now placed in the name of the Minnesota Department of

Revenue. They in turn would sell the property to the party making the highest offer.

Please le me know as soon as possible if you are in agreement with this proposal in order that I could then draft the necessary deed for signature.

Very truly yours,

James J. Hulwi, attorney

JJH/SLP

cc: Mr. Arthur N. Nassar

Auto-Owners Page 1 Homeowners Policy Declaration

Location 1 Renewal Eff 07-29-86
Insurance Company
Lansing, MI 48909

James R. Weir Agency DB POLICY NUMBER
06-908 P.O. Box 1146 R 808706 08231000
Mankato MN 56001 POLICY TERM
12:01 A.M. 12:01 A.M.
07-29-86 TO 07-29-87

INSURED DUANE & PAMELA LARSON

ADDRESS P.O. BOX 3265
MANKATO MN 56001

THIS POLICY IS HEREBY REMENDED IN CONSIDERATION OF THE PREMIUM SHOWN BELOW.

LOCATION OF INSURED PREMISES: 1037 THUDERBIRD (sic) HILLS ST PETER MN 56082

INSURANCE IS PROVIDED WITH RESPECT TO THE FOLLOWING COVERAGES, SUBJECT TO ALL CONDITIONS OF THE POLICY

SECTION I COVERAGES	LIMITS OF LIABILITY
C. PERSONAL PROPERTY	$60,000
D. ADDITIONAL Living EXPENSE	$12,000
SECTION II COVERAGES	
E. PERSONAL LIABILITY (EACH OCCURRENCE)	$300,000
F. MEDICAL PAYMENTS (EACH PERSON/ EACH ACCIDENT	$1000/25,000

FORMS & ENDORSEMENTS 17604(09-85) 17694(09-85)
ANNUAL PREMIUM
BASIC $239.00
17638(07-79)
59153(02-86) SCHEDULED PROPERTY $180.20
16000(04-81) TOTAL POLICY PREMIUM $419.20

SECTION I DEDUCTIBLE $100 FLAT - ALL PERILS
TERRI. 007 00 TYPE 1
1 FAMILY

CONSTRUCTION	FRAME	
RESPONDING PRCT CLASS	08	
ZONE	37	
PREMIUM GROUP	1	NO WOOD HEATING EXCEPT FIREPLACE

ISSUED 06-24 -36 COMPANY ISSUED AGENT 200

MINNESOTA PROPERTY INSURANCE
PLACEMENT FACILITY
744 N. 4TH STREET • MILWAUKEE, WISCONSIN 53203
• (414 276-1616 11/26/86

No. MFP 102913-D RENEWAL OF NUMBER NEW

Insured's Name and Mailing Address
LARSON, DUANE W
PO BOX 3265
MANKATO, MN 56001

11-13-86 11-13-87 1
Inception (Mo Day Year) Expiration (Mo Day Yr) Years

AGENT'S NAME AND ADDRESS 60227
JAMES WEIR AGENCY
PO BOX 1146
MANKATO, MN 56001

STANDARD FIRE
INSURANCE POLICY

It is important that the portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

INSURANCE IS PROVIDED AGAINST ONLY THOSE PERILS AND FOR ONLY THOSE COVERAGES INDICATED BELOW BY A PREMIUM CHARGE AND AGAINST OTHER PERILS AND FOR OTHER COVERAGES ONLY WHEN ENDORSED HEREON OR ADDED HERETO.

AMOUNT	RATE	PREPAID TERM PREMIUM DUE AT INCEPTION	PERIL(S) Insured Against and Coverages(s) Provided (Insert Name of Each)
$80,000.00			$ 696.00
			81.00
			.00
			.00
POLICY DEDUCTIBLE $250		TOTALS	777.00

Item No.	Amount Fire or Fire and Extended Coverage or Other Peril	Per Cost of Co-insurance Applicable	DESCRIPTION AND LOCATION OF PROPERTY COVERED Show construction, type of roof and occupance of building(s) covered or containing the property covered. If occupied as a dwelling state number in family
01	$80,000		ONE STORY, ONE FAMILY FRAME VACANT DWELLING, SITUATED AT: 1037 THUNDERBIRD HILLS, KASOTA, MN

Subject to Form No(s). P-1(1-77) DP-300(6-83) attached hereto
Mortgage Clause: Subject to the provisions of the mortgage clause attached hereto, loss, if any, on building items, shall be payable to:

Provisions Required by Law to be Stated in this Policy:- "This Policy is issued under and in pursuance of the laws of the State of Minnesota, relating to Guaranty Surplus and Special Reserve Funds." Chapter 437, General laws of 1909.
IN CONSIDERATION OF THE PROVISIONS AND STIPULATIONS HEREIN OR ADDED HERETO
AND OF the premium, this company, for a term of years from inception date (At 12:01 A.M. Standard Time) to expiration date (At 12:01 A.M. Standard Time) at location of property involved, to an amount not exceeding the amount(s) specified in the Declarations does insure the insured named in the Declarations and legal

representatives. The insurance effected herein is granted against all LOSS OR DAMAGE BY FIRE ORIGINATING FROM ANY CAUSE, EXCEPT AS HEREINAFTER PROVIDED, ALSO ANY DAMAGE BY LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which ry (sic) of the property shall necessarily by removed for preservation from the perils insured against in this policy, but not elsewhere. The amount of said loss or damage, except in case of total loss on buildings, to be estimated according to the actual value of the insured property at the time when such loss of the insured property shall be exposed to loss or damage from the perils insured against, the insured shall make all reasonable exertions to save and protect same.
Assignment of this policy shall not be valid except with the written consent of the company.
This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter state, which are hereby made a part of this y (sic) together with such provisions, stipulations and agreements as may be added hereto, as provided in this policy.

WARRANTY DEED

This Indenture, made this 16th day of May 1980
between Lawrence A. Larson and Thressa Larson, husband and wife
of the County of Emmat and State of Iowa
parties of the first part, and Duane W. Larson
of the County of Blue Earth and State of Minnesota
party of the second part.

Witnesseth That the said, parties of the first part, in consideration of the sum of One Dollar and Other Good and Valuable Consideration to them in hand is paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby Grant, Bargain, Sell and convey unto said party of the second part himself, his heirs and assigns, Former, all the tract or parcel of land lying and being in the County of LeSueur and State of Minnesota, described as follows, to-wit:

Lot 37, Block 1, Thunderbird Hills, Le Sueur County, Minnesota, according to the Plat thereof on file and of record in the Office of the Register of Deeds of Le Sueur County, Minnesota.

State Deed Tax Due: $308.00

To Have and to Hold the Same. Together with all the hereditaments and appurtiances thereunto belonging or in anywise apportioning to the said party of the second part himself, his heirs and assigns Forever, and the said Lawrence A. Larson and Thressa Larson, husband and wife parties of the first part, for themselves, their heirs, executors, administrators, do covenant with the said pary of the second part, himself, his heirs and assigns that they are well seized in fee of the lands and premises aforesaid, and have good right to sell and convey the same in manner and form aforesaid and that the same are free from all incumbrances.

And the above bargained and granted lands and premises, in the quiet and peacable possession of the said party of the second part himself, his heirs and assigns against all persons lawfully claiming or to claim the whole or any part thereof, subject to incumbrances, if any, hereinbefore mentioned, the said parties of the first part will Warrant and Defend.

In Testimony Whereof, The said parities of the first part have hereunto set their hands this day and year first above written.

signed
Lawrence A. Larson
signed
Thressa Larson

State of Minnesota
County of Blue Earth

The foregoing instrument was acknowledged before me this 16th day of May 1980 by Lawrence A. Larson and Thressa Larson, husband and wife

Signature Bruce Miller (Notary)
Title (of Book)_____
Serial Number (if any) _____

THIS INSTRUMENT WAS DRAFTED BY
James J. Hulwi, Attorney
202 Northwestern Office Bldg.
Mankato, MN 56001

Tax Statement For The Real Property Described in This Instrument Should Be Sent To:
Name Mr. Duane W. Larson
Address 1037 Thunderbird Hills
Kasota, MN 56050

RELEVANT FEDERAL LAW

42 USC 1983: "Every person who, under color of any statute...of any state...causes to be subjected...any citizen of the U.S....to the deprivation of any rights...secured by the Constitution and laws, shall be liable...for redress."

14th Amendment to the U.S. Constitution:"...nor shall any State deprive any person of...liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1st Amendment: a citizen shall have the right"...to petition the Government for a redress of grievances."

MINNESOTA CONSTITUTION ARTICLE I

Sec. 7: "No person shall...be deprived of...liberty, or property without due process of law..."

Sec. 8: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his...property...and to obtain justice freely and without purchase, completely and without denial..."

Sec. 11: "...no conviction shall work corruption of blood or forfeiture of estate."

Sec. 12: "...A reasonable amount of property shall be exempt for seizure for the payment of any debt or liability. The amount of such exemption shall be determined by law..."

MINNESOTA STATUTES

Minn. Stat. 270.71: "Seized property acquired by the state of Minnesota to satisfy unpaid taxes shall be resold by the commissioner. The commissioner shall preserve the value of seized property while controlling it..."

Minn. Stat. 510.01: "The house owned and occupied by a debtor as the debtor's dwelling place, together with the land upon which it is situated to the amount of area and value hereinafter limited and defined, shall constitute the homestead of such debtor and the debtor's family, and be exempt from seizure or sale under legal process on account of any debt not lawfully charged there on in writing, except such as are incurred

for work or materials furnished in the construction, repair, or improvement of such homestead, or for services performed by laborers or servants and as is provided in section 550.175."

Minn. Stat. 510.02: "The homestead may include any quantity of land not exceeding 160 acres..."

Minn. Stat. 510.07: "The owner may sell and convey the homestead without subjecting it, or the proceeds of such sale for the period of one year after sale, to any judgment or debt...The owner may remove therefrom without affecting such exemption, if the owner does not thereby abandon the same as the place of abode. If the owner shall cease to occupy such homestead for more than six consecutive months the owner shall be deemed to have abandoned they same unless, within such period, the owner shall file with the county recorder...a notice...describing the premises and claiming the same as the owner's homestead..."